A COMPARISON BETWEEN THE MANNER IN WHICH A COURT WILL SECOND-GUESS THE EXERCISE OF A PRIVATE CONTRACTUAL POWER, ON THE BASIS OF PUBLIC POLICY, AND THE MANNER IN WHICH A COURT WILL SECOND-GUESS THE EXERCISE OF A PUBLIC POWER, ON THE BASIS OF RATIONALITY

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ABSTRACT

This thesis considers and compares the standards against which Courts in South Africa review the exercise of private contractual power, on the basis of public policy, and the standards against which Courts in South Africa review the exercise of public power on the basis on rationality. This thesis undertakes this task in four main parts.

Firstly, this thesis outlines important theoretical distinctions between legal and non-legal powers, and private and public legal powers. In this regard, it is argued that what distinguishes a legal power from a non-legal power is the ability of the exercise of a legal power to in and of itself change another person's legal situation. This differs from the exercise of a non-legal, or a "power of influence" which has natural, and no automatically legal consequences, and will only change another legal situation if other (natural) consequences come to bear first. In relation to the distinction between private and public powers, this thesis outlines the traditional justifications for the distinction drawn between private and public power. Drawing on Austin, this thesis proposes that a useful demarcation between public and private powers is that the latter, more peculiarly, regards persons determined specifically, while the former, more peculiarly, regards the public considered indeterminately.

Secondly, this thesis unpacks and details the standard of rationality that a Court will hold the exercise of a public power to, and highlights how rationality in this respect is an objective standard that relates essentially to a power's objective and whether or not the exercise of that power is related to that objective. Thirdly, and drawing on the latest pronouncements of the Constitutional Court, this thesis details what public policy requires of the exercise of private contractual power and highlights how what it requires is a value laden and facts dependent inquiry.

Fourthly, this thesis goes on to argue that the standard of public policy, to which exercises of private contractual power are held to, is a higher standard than the standard of rationality that the exercises of public power is held to. Furthermore, this thesis argues that while such a situation is justifiable, it may become unjustifiable should Courts begin to misconstrue the fundamental differences between a legal and non-legal, and private and public power. Finally, this thesis submits that another

cornerstone of South Africa's contract law, namely, that of privity of contract, may be a useful tool that Courts can use to keep balanced, on what this thesis outlines is a tightrope, that Courts have to walk in both having to imbue South Africa's contract law with Constitutional values, while at the same time ensuring that the higher standard that private contractual power wielders are held to, does not become unjustifiable.

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I. CHAPTER ONE: INTRODUCTION AND OUTLINE

a. Introduction

Consider the two-following fictitious scenarios:-

Scenario 1, a contractual provision which provides that:

X shall have the right to extend the Lease period by a further period as set out in clause 10 below, provided X gives Y written notice of its exercising of the option at least 6 months prior to the termination date.

Scenario 2, a Minister's decision to promulgate regulations to the effect that:

The sale, distribution and transportation of any tobacco products and any alcoholic beverage is prohibited during the National State of Disaster which was declared by the President on 1 June 2020.

Traditionally, at least, the notion that X, in circumstances where it failed to properly exercise its option, would be able to approach a Court and ask the Court to essentially second-guess Y's enforcement of the contractual provision in Scenario 1 would for the most part, be a non-starter. [1] In comparison, it would be quite ordinary for the citizenry in a constitutional democracy to assume (and perhaps demand) that Minister's decision in Scenario 2 get tested in a Court against the prescripts of the relevant constitution, and if necessary, the Court would be more than entitled to set the Minister's actions in Scenario 2 aside. This is because traditionally it has been thought that, for the most part, it is only the exercises of public power that can, and ought, to be subject to some form of judicial review. It would also be fair to proffer that the citizenry may very well hold the view that even if a Court could interfere in Y's enforcement of the contractual provision in Scenario 1, it would be on significantly

[1] See Dale Hutchison 'The Nature and Basis of Contract' in Dale Hutchison, Chris-James Pretorius and Tkajie Naude (eds) *The Law of Contract in South Africa* 3 ed (2017) 25 – 62 at 52 – 53.

stricter grounds than a Court would be entitled to interfere with the Minister's decision in Scenario 2. The purpose of this submission is to indicate that it may not necessarily be so. Consider however, what the position may be if X was a large tobacco and/or alcohol distributor and the (common cause) effect of Y adopting the position it adopts is to preclude indefinitely a certain portion of the citizenry from accessing tobacco and/or alcohol. It would be safe to assume that in such a situation at least a part of the deprived citizenry may very well feel that a Court ought to interfere with X and Y's contractual arrangement and prevent Y from adopting the position it intends to adopt. Anecdotally, the deprived citizenry may feel that Y cannot, on whim, interfere and/or prevent them from exercising whatever rights they believe they have in relation to accessing and consuming alcoholic/tobacco products. They may believe that should Y do so, it should be for a Court to step in an tell Y how it can and cannot act, and reprimand Y for taking a decision which interferes with whatever rights they believe they, the deprived citizenry, have.

In theory, there are a spectrum of possible positions that a legal system may adopt in approaching the question of how Y's exercise of its contractual power or its enforcement of its contractual entitlements may be reviewed, if, of course, at all. On the one hand, and at one extreme of the spectrum, a legal system could adopt the position that parties to a contract are only to be held to their self-imposed standards, and nothing else need be considered[2] when determining whether the manner in which a party to a contract exercises its private contractual power is lawful or not. [3] On the other hand, and at the other extreme end of the spectrum, a legal system could adopt the position that a party's exercise of its private contractual power can be totally evaluated and only held to be lawful if it is thought to be normatively acceptable in the particular circumstances.[4]

The primary endeavour of this submission is to compare the standard that a Court will second-guess the exercise of public power to, on the basis of rationality, with the

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[2] Assuming of course that there is compliance with the contract and the party is acting fraudulently or dishonestly.
[3] See Alister Price and Andrew Hutchison 'Judicial Review of Exercises of Contractual Power: South Africa's Divergence from the Common Law Tradition' (2015) 79 *Rabels Zeitschrift fur auslandisches und internationals Privatrecht* 822 at 823.
[4] Ibid.

standard that a Court will second-guess the exercise of private power to, on the basis of public policy.

b. Brief Outline

This submission will proceed as follows. Chapter 2 outlines the idea of a “legal” versus a non-legal power, and the distinction between private and public powers. Chapter 2 outlines some of the reasons, both historically and as a matter of ideological persuasion, that jurisdictions may, or may not, hold the distinction between public and private powers to be important and justifiable. Chapter 3 examines the manner in which courts review the exercises of public power on rationality grounds. In doing so, what exactly rationality entails will be assessed. Chapter 4 provides an overview of the manner in which the Constitutional Court has now confirmed exercises of private contractual power and contractual provisions are to be tested against the threshold of public policy. Chapter 5 then endeavours to compare the standard that a Court will hold the exercise of public power to on rationality grounds, and the exercise of private power to on public policy grounds. The argument advanced in Chapter 5 is that the Courts justifiably hold the exercise of private power on public policy grounds to higher standards than they do the exercise of public power on rationality grounds. Chapter 5 then assesses and compares the reasons why Courts may or may not seek to “defer” to the various power wielders. Chapter 5 then details how the higher threshold that Courts hold the exerciser of private power to may become unjustifiable, and argues that Courts have a tightrope to walk by having to ensure that contract law is imbued with Constitutional values while ensuring that the high standards of conduct that contract law imposes on private parties does not become unjustifiable relative to the standard that Courts hold the exercises of public power to on rationality grounds. Chapter 5 concludes with a suggestion of how Courts may be able to reason on the basis of, or deploy the concept of, privity of contract, to ensure that they do not push the limits of the justifications for why exercises of private powers can be held to a higher standard than the exercise of public powers (on public policy, and rationality grounds, respectively).

II. CHAPTER TWO: POWERS – LEGAL AND OTHER POWERS AND PUBLIC AND PRIVATE LEGAL POWERS

a. Legal and non-legal powers

Both “legal powers” and “non-legal powers” have the ability to change any theoretical “legal situation” (i.e. any rights, duties, privileges, obligations and so on, that may be applicable to any situation).[5] However, the way in which the exercise of a legal power may change a theoretical legal situation is different to the way in which the exercise of a non-legal power may change a theoretical legal situation.[6] Consider the following Example, made up of two instances:

> In instance one, A and B enter into a contract whereby B is to supply A with specific services. B, therefore, has an obligation to provide those specific services to A. A then cancels the contract in the terms of the contract’s cancellation clause, and thus B no longer has an obligation to provide A with those specific services that it would have had to provide to A, if it was still bound by the contract.
>
> In instance two, A and B are bound by the same contract as in instance one, but C convinces A that it can offer A a better deal than B can, and therefore A cancels its contract with B to enter into a contract with C.

In instance one, A exercises a legal power which affects the legal situation of B. Whereas, in instance two, C exercises a non-legal power which affects the legal situation of B.[7] Thus, both A and C can change the legal situation of B. Although it is easy to see that *prima facie* A and C do not change B’s legal situation in the exact same way, the manner in which A and C change B’s legal situation is not easy to

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[5] Christopher Essert ‘Legal Powers in Private Law’ (2015) 21 *LEG* 136 at 137.
[6] Ibid.
[7] This example assume that C’s actions are lawful.

accurately distinguish. Indeed, the difference in how the exercise of either a legal or a non-legal power affects a particular legal situation, or as put by Essert, the "central distinction"[8], is difficult to pin-point for at least two reasons.

The first reason is that it is not always as easy as it was in instance one and two to determine whether a legal a non-legal power has been exercised. For example, assume that in the Example, B only represents to A that it will provide A with specific services, which representation A relies on. This reliance by A may change the legal situation between A and B because should B fail to deliver the specific services, B may be subject to some kind of liability in favour of A.

The second reason is simply that the use of the English word "power" can confuse one's attempts to draw the central distinction. The term "power" is, and would understandably be, commonly used to describe both situations, which muddies any distinction between the nature of the two different kinds of power being exercised by A and C. Thus, conceptually it is hard to determine how the exercise of each power may change the relevant legal situation, as for the most part, the two "powers" are seen as the same thing: "power".

Although making the central distinction is, for at least the two reasons listed above, not easy to make, the difference in how the exercise of a legal and a non-legal power affects any legal situation can be determined when one considers the position of C more closely.

It would be uncontentious to hold that C is exercising a non-legal power.[9] C is exercising what Joesph Raz terms "power as influence"[10] as opposed to a legal power. When the manner in which C's exercise of its non-legal power changes the relevant legal situation is more closely examined, it is apparent that the change in legal situation brought about by C's exercise of its non-legal power is brought about causally. This means that C needs to cause other things to happen in order for B's legal situation to

[8] Essert op cit note 5 at 140.
[9] This is not to say that what C is doing is unlawful, or that C does have a right to undertake the action that it does.
[10] Joseph Raz *Practical Reason and Norms* 2ed (1999) 103.

change, or put differently, C needs to do something which results in a chain of events occurring which then leads to an eventual change in B's legal situation.

Drawing on H.L.A Hart's commentary on the works of Jeremy Bentham,[11] when C exercises the power that it wields, its "power as influence", C's actions cause natural effects, not legal effects. It is only if these later natural effects caused by C actually occur, will there be a change in the relevant legal situation: it is only if C successfully convinces A to do something will there be a change in B's legal situation. Whereas if A exercises its legal power, such exercise will, or rather can, on its own, have a legal normative effect, and change B's legal situation. Thus, the change in the situation affected by A (the legal-power wielder) is not causally dependent on another act. Simply put, changes in any relevant legal situation brought about through the exercises of legal powers are not brought about causally, and are not dependent on any natural causation effects.[12]

Raz also recognises this point made by Hart and proposes that for the exercise of a power to be regarded as a normative power (for our purposes, a legal power), that act must change the norm (for our purposes, the legal situation) sought to be changed, normatively and not merely causally.[13] An act does this, according to Raz, if it is the mere result of the act that determines the application (or change) of the norm. Whereas, according to Raz, an act affects a norm causally if it is a consequence of that act which determines the norm's applicability or change, and not merely the act itself. [14]

Thus, although making the central distinction is not always easy, one can discern legal powers from non-legal powers by focusing on the exercise of each powers' effect and, in particular, its causality. As simply put by Essert, "while we can change our legal

[11] H.L.A Hart 'Bentham on Legal Powers' (1972) 81 5th Issue *Yale Law Journal* 799 at 820.
[12] Essert op cit note 5 at 142.
[13] Michael G. Pratt 'Promises, Contracts and Voluntary Obligations' (2007) 26 No.6 *Law and Philosophy* 531 at 540.
[14] Ibid. Raz also recognizes a second necessary condition that must be met if the exercise of a power is to be regarded as the exercise of a normative or legal power which is that the exercise of that power must only be recognized as affecting legal norms and those norms' application, if it is desirable to enable people to affect those norms and their application. This second necessary condition is not relevant for current purposes.

situations causally in any manner of ways, legal powers are distinctive in that they uniquely allow us to bring about legal changes non-causally."[15]

According to Hohfeld, strictly fundamental legal relations are by their nature *sui generis* and are therefore, by their nature, hard to define, and most attempts at a formal definition are unsatisfactory. [16] Therefore, Hohfeld proposes that the most promising way of examining strict legal relations is by examining all the various legal relations in a scheme of oppositions and correlatives. [17] In such a scheme a legal power's opposite is a "legal disability", and its correlative, a "legal liability".[18] When a change in any legal relation occurs (i.e. when any legal situation changes) which is the result of some superadded fact or group of facts under the volitional control of a person, that person whose volitional control is paramount is said to have the legal power. [19] Or, as usefully described by Cockrell[20] if one is to say that X has a legal power vis-à-vis person Y, it means that X has the competence to alter the legal position of Y, and Y labours under the correlative liability that its legal position is susceptible to change (for better or for worse) by X.

The distinction between what a legal power is, and what a "power of influence" is, is an important one, because, as will be argued later, should Courts allow the exercises of "powers of influence" to be reviewed, as opposed to exercises of strictly legal powers, the higher standard that Courts hold the exercise of private power to (on public policy grounds) relative to the exercises of public power (on rationality grounds) will become unjustifiable.

b. Public and Private Powers

It is necessary to outline the difference between a "private" and a "public" power. This is so as when the manner in which the exercises of the two kinds of powers can be

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[15] Essert op cit note 5 at 145.
[16] Wesley Newcomb Hohfeld 'Some Fundamental Legal Conceptions as Applies in Judicial Reasoning' 23 *Yale Law Journal* 16 at 30.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Alfred Cockrell 'Second-guessing the Exercise of Contractual Power of Rationality Grounds' (1997) *Acta Juridica* 26 at 26.

reviewed is examined and compared, it will be important to give consideration to both what the fundamental and conceptual differences between the two kinds of powers are, and why there has, historically and traditionally, at least, been such an important distinction drawn in between the two kinds of power.

The distinction, or at least people drawing the distinction between public and private law, and therefore the difference between public and private legal powers, has appeared since at least the time of the *Corpus Juris Civilis*, [21] wherein Ulpian said "Public law is that which regards the government of the Roman Empire; private law, that which concerns the interest of individuals."[22]

Austin notes two general difficulties within the subject of trying to determine what the true nature of, and the distinction between, public and private law are. The first, with regard to public law, is that certain aspects of public law which regard the constitution and the manner in which the Sovereign exercises its sovereign power, are not positive law, but are positive morality or ethical maxims. [23] The second is the difficulty in "drawing the line of demarcation by which the conditions of private persons are severed from the conditions of political subordinates".[24] This difficulty arises as both the rights and duties of private persons (such as rights one may have in terms of a contract they have entered into) and political subordinates (such as judges, ministers or other officers of justice) are creations of the same author, being the State or Sovereign. [25] The only possible demarcation which can possibly be drawn according to Austin is that when a condition is private, the powers vested in the person who may bear it "more peculiarly regard persons determined specifically" and when the condition is public those powers "more peculiarly regard the public considered indeterminately."[26]

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[21] John Henry Merryman 'The Public Law-Private Law Distinction in European and American Law' (1968) 17 *Journal of Public Law* 3 at 5.
[22] Translation taken from Sanders *I*.1.1.4 as used by Cockrell in Alfred Cockrell "'Can You Paradigm?' – Another Perspective on the Public Law/Private Law Divide" (1993) *Acta Juridica* 227 at 227.
[23] John Campbell Austin '*Lectures of Jurisprudence or the Philosophy of Positive Law*' 3ed (1874) at 771 to 772.
[24] Austin op cit note 23 at 773.
[25] Ibid.
[26] Austin op cit note 23 at 774.

A large force behind the distinction between public and private law has been ideological. [27] The codified civil laws of France, Austria, Italy and Germany in the 19th century – which gave expression to the dominant currents of economic, social and political thought of those places in 17th and 18th centuries – had as dominant concepts individual private property and the freedom of contract. [28] As a consequence of the rationalistic and secular thinking, jurists proposed that the fundamental rights of property and contract were guarantees of individual rights against intrusion by the state. [29] Private law was consequently seen as the area of law wherein the only function of the state was to recognise and enforce private rights. The attempt to distinguish private law from public law was therefore an attempt to establish and triumph the autonomy of the individual and to fashion a private preserve for the individual so as to guarantee the unfettered activity of juristic persons in the market. [30] Private law is therefore, another form of the triumph of contract. [31] There were many assumptions which accompanied this attitude towards private law, most of which would not hold true today, such as a view that the main actors in the economy are private individuals, and an assumption that neither large corporations, labour unions, nor governments were to broadly participate in society. [32] A further accompanying assumption which would not hold today was that the legal playing field only had two actors, being the state and the private individual, both of which had their own legal domain: public law for the state, and private law for the private individual. [33]

There are many other ideological persuasions which could influence the way in which a certain jurisdiction may conceive of the distinction between private law and public law. Jurisdictions which have a more collectivist or communal outlook, who believe that the interests of the collective ought to trump those of the individual, may conceive of the private laws of contract and property as hinderances, and may accordingly adopt a view that all law is public law. Jurisdictions which have experienced totalitarian or authoritarian governments may want to reject a principle that the state is superior to

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[27] John Henry Merryman op cit note 21 at 11 to 13.
[28] John Henry Merryman op cit note 21 at 11.
[29] Ibid.
[30] John Henry Merryman op cit note 21 at page 11 and fn 33.
[31] John Henry Merryman op cit note 21 at page 11 - 13.
[32] Ibid.
[33] Ibid.

the individual, and accordingly do away with the distinction between public and private law so to subject the state to the stricter principles found in private law. [34]

As has can be seen from the above, the distinction between public law and private law, and therefore, public and private powers, is one which is vexed and intertwined with any jurisdiction's history and socio-political ideology. However, there are at least two themes which emerge in the trail of the classic Roman distinction given above, which essentially holds that public law governs the relations between individual and the state and private law concerns the relationships between private individuals.[35] The first is that public law and private law are distinguished and given different treatment because the relationship between the state and private individuals is one between fundamentally unequal parties, whereas, there is at least an assumption that private law is concerned with persons who have equal power. Indeed, it is this theme of there being an inequality in the relative power between the two concerned parties which seems to be the most commonly drawn by contemporary public law authors. Devenish *et al*[36] state that "private law regulates relationships on the basis of equality, whereas public law regulated relationships between government organs *inter se* or between government organs and individuals on the basis of subordination." Wiechers states that "public law governs unequal relationships of authority between government organs and subjects, and … private law governs equal voluntary relationships" and that according to a broader view, public law governs public interests whereas private law governs private interests."[37] The second theme suggests that public law by definition intrudes into the political realm, whereas private law is absolutely divorced from it.[38] As stated by Hoexter, "administrative law has a close relationship with disciplines of political science."[39]

[34] Ibid.
[35] Cockrell op cit note 22 at 227.
[36] GE Devenish, K Govender and DH Hulme '*Administrative law and justice in South Africa*' (2001) at 22.
[37] Marinus Wiechers '*Administrative Law*' (1985) translated from the Afrikaans by Gretchen Carpenter at 8.
[38] Ibid.
[39] Cora Hoexter 'Administrative Law in South Africa' 2ed (2012) at 8

III. CHAPTER THREE: THE JUDICIAL REGULATION OF PUBLIC POWER ON THE BASIS OF RATIONALITY

The Constitution of the Republic of South Africa, 1996 ("**Constitution**") regulates public power in numerous ways. As put by the Constitutional Court in *President of the Republic of South Africa and others v SARFU and others* ("***SARFU***")[40]:

> "*The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the legislature, the executive and the judiciary which determines who may exercise power in particular spheres. An overarching bill of rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers."*

This contribution only focuses on one of these ways, being that of judicial review.[41] Generally, there are two bases upon which a court in Constitutional South Africa will review the exercise of public power. The first basis that a Court may base its review on are the requirements which, as will be indicated below, are implicit and explicit in the Constitution that any exercise of public power must meet all of the requirements of the Rule of Law, the principle of legality, and must be rational. The second basis is the invoking of section 33 of the Constitution which *inter alia* guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. However, owing to limited scope this second basis will not directly be dealt with herein.

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[40] 2000 (1) SA 1 (CC) at para 132.

[41] There are many other means by which exercises of public power can be regulated, such as, to name but only a few: by means of internal administrative appeals; alternative dispute resolution mechanisms, and legislative controls and oversight, through national, provincial and local legislative bodies. Hoexter, in relation to other means of regulating exercises of public power, goes so far as to say: "political and representative controls such as public participation may guide and shape the exercise of administrative action far more effectively than review" Hoexter op cit note 39 at 160.

a. The Rule of Law, the Principle of Legality and Rationality

Right from the adoption of the Constitution, it has been held that any exercise of public power must comply with the tenets of the rule of law, including the principle of legality. This is to be expected as section 1 (c) of the Constitution states that South Africa is one, sovereign, democratic state founded on the values of inter alia the supremacy of the constitution and the rule of law. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[42] ("***Fedsure***") the Constitutional Court described the rule of law as expressing the principle of legality, or, put differently, the principle of legality is a part of the doctrine of the rule of law, [43] a value upon which South Africa is based.[44] The Constitutional Court further held that the principle of legality generally expressed the idea that the exercise of public power is only legitimate where lawful,[45] and was fundamental to the Constitution of the Republic of South Africa Act 200 of 1993 ("**interim Constitution**").[46]

In *SARFU* the Constitutional Court held that just because the President was exercising a power conferred upon him by the Constitution, and his exercise of that power was not administrative action, did not mean that "there are no constraints upon it", but there were in fact "significant constraints" on the exercise of such power, which constraints were to be found throughout, and implicit in, the Constitution[47]. The Constitutional Court further went on to reiterate what it held in *Fedsure* and stated that the President's exercises of power are constrained by the principle of legality, and "as is implicit in the Constitution, the President must act in good faith and must not misconstrue his powers". [48]

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[42] 1999 (1) SA 374 (CC) at para 56.
[43] Cora Hoexter "The Principle of Legality in South African Administrative Law" (2004) 4 *Macquarie Law Journal* 165 at 181.
[44] At para 57, wherein the Constitutional Court points to section 1 (c) of the Constitution.
[45] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) ("***Fedsure***"). See too Hoexter op cit note 39 at 160.
[46] *Fedsure* supra note 45 at para 58. Importantly, section 1 (2) of the interim Constitution, upon which the court made this finding was not amended in the Constitution.
[47] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 148 ("***SARFU***").
[48] *SARFU supra* note 47 at para 148.

The Constitution dictates that every exercise of public power should not be arbitrary and should be rational.[49] As described by Price, this principle, which has been developed by the Constitutional Court, sets as a necessary condition to any legally valid exercise of public power, rationality or non-arbitrariness.[50] Accordingly, rationality or non-arbitrariness act as constitutional thresholds that every exercise of public power must pass to be legally valid. Albeit what rationality may require will be discussed below, as a general proposition when determining whether exercises of public power are rational, courts must determine whether or not the conduct in question is rationally connected to a legitimate government purpose.[51] That this is the case has been recognised by the Constitutional Court right from its inception.[52]

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[53] Chaskalson P stated the following, now often cited, paragraphs:

> "*It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."*[54]
>
> And
>
> *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry."*[55]

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[49] Alistair Price "The content and justification of rationality review" (2010) 25 *SAPL* 346 at 346.
[50] Alistair Price op cit note 49.
[51] Alistair Price op cit note 49 at 347.
[52] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 156.
[53] 2000 (2) SA 674 (CC).
[54] At para 85.
[55] At para 86.

This rationality, Chaskalson P went on to state, is a minimum threshold requirement applicable to the exercise of all public power, and conduct which fails to pass this minimum threshold is inconsistent with the requirements of the Constitution and is accordingly unlawful. [56]

In *Albutt v Centre for the Study of Violence and Reconciliation and other*[57] the Constitutional Court stated:

> *"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution.*"

In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*[58] the Constitutional Court, while quoting from *Prinsloo v Van der Linde and Another,*[59] held and clarified, firstly, that a person seeking to impugn the exercise of a public power on the basis of rationality cannot rely on the fact that there may have been a better way for the public power wielder to achieve their objective, and, secondly, that as long as there is a rational relationship between the method and the object, it is irrelevant that the objective could have been achieved in a different way. [60] In *Merafong Demarcation Forum and Others v President of the Republic of*

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[56] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 90.
[57] 2010 (3) SA 293 (CC).
[58] 2002 (3) SA 265 (CC).
[59] 1997 (3) SA 1012 (CC).
[60] *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC) at para 41.

South Africa and Others[61] the Constitutional Court held that provided the exercise of a public power serves a legitimate public purpose, "the political merits or demerits" are of no concern to the reviewing Court. [62]

In *Democratic Alliance v President of the Republic of South Africa and Others*[63], the High Court remarked that rationality review is "really concerned with the evaluation of a relationship between means and ends" and its aim is not to determine whether some means will achieve the purpose better than others, but only whether the means employed are rationally related to the purpose for which the power was conferred. [64]

Lastly, and importantly, the test for rationality is an objective one [65] and the requirement of rationality is not directed at a determination of whether or not the impugned exercise of public power is fair or reasonable. [66]

Although the rationality threshold appears *prima facie* to be straight forward, what it exactly requires is not always clear. This lack of clarity is occasioned by the "metaphorical requirement" of there being a rational connection or relationship between the exercise of a public power and a purpose. [67] Price proffers that what rationality review requires is a two-pronged assessment of, firstly, what a law's purpose is and secondly, what the actual or probable effect of the law is. [68] In relation to the first prong of the test, oftentimes determining what the purpose of the power-conferring law is, will be straight forward and merely entail some statutory interpretation.[69] In other situations what the purpose of the power-conferring law is may be more difficult to determine, and the court may have to exercise some judicial discretion. Price suggests that a preferable alternative would be to hold that the purpose of the power-conferring law would only be legitimate if it is consistent with all

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[61] 2008 (5) SA 171 (CC).
[62] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 63.
[63] (2016) 3 All SA 537 (WCC).
[64] At para 85.
[65] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("***Motau***") at para 69.
[66] *Law Society of South Africa and others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 35.
[67] Alistair Price op cit note 49 at 354.
[68] Alistair Price op cit note 49 at 354.
[69] Alistair Price op cit note 49 at 354. The court will also have the benefit of the power wielder's submissions as to what the purpose of the power is. The court can accept or reject that submission, and/or accord it whatever weight it deems fit. But nonetheless it will have the benefit the power holder at least submitting to it what it believes the purpose is.

other legal and Constitutional constraints including the Bill of Rights and the Constitution's objective normative value system. [70] In relation to the second prong of the test, the court is called upon to make a causative and somewhat speculative[71] determination, which is to determine what the effect of the exercise of the public power will be. The court will need to determine whether the effect of the exercise of the public power serves the determined purpose sufficiently well so as to be held to have a rational connection to it.[72] Price submits that should the exercise of the public power achieve its determined purpose symbolically (or, put differently, if it has intrinsic value), or brings about its ends (the realization of its purpose) as a matter of empirical causality (or, put differently, if it has instrumental value), it will meet the relevant threshold of connection/relationship to its determined purpose, and therefore be rational. [73] Courts therefore need to apply an "evaluative purpose requirement" and a "vague effect requirement." [74]

Albeit exercises of executive action need to be lawful, rational and done in a manner consistent with the Constitution, exercises of executive action need not be procedurally fair. [75] However, exercises of executive action need to be procedurally rational. [76] Procedural rationality "is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power".[77]

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[70] Alistair Price op cit note 49 at 354.
[71] It is speculative as the court will need to, at least in part, determine what the effect will/may be in the future. The court is not seeking to determine what the effect has been.
[72] Alistair Price op cit note 49 at 355.
[73] Alistair Price op cit note 49 at 356.
[74] Alistair Price op cit note 49 at 356.
[75] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para 78.
[76] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 64 ("***Law Society of South Africa***").
[77] *Law Society of South Africa* supra note 76 at para 64.

IV. CHAPTER FOUR: JUDICIAL REGULATION OF PRIVATE CONTRACTUAL POWER ON THE BASIS OF PUBLIC POLICY

As I have stated above, the focus of this submission is to compare the manner in which a Court will review or second-guess the exercise of private contractual power on public policy grounds, with the manner in which a Court will review or second-guess the exercise of public power on rationality grounds. By a "private contractual power" I mean a power that a private person has and exercises in terms of a contract. There are, of course, other means by which a Court may review the exercise of private contractual powers. For example, Courts may review the manner in which a party exercises a private contractual discretionary power in accordance with the principle of *arbitrium boni viri*, which requires that a party must exercise the discretion that they have in terms of a contract reasonably. [78] However, going beyond public policy is out of the remit of this submission and public policy is the substantive ground upon which exercises of private contractual power have been sought to be reviewed that has received the most attention both in the literature and in the case law.

a. Necessary historical observations and theoretical underpinnings

At this juncture, and prior to examining the manner in which a court will review exercises of private contractual powers on public policy grounds, it is worth outlining some important historical, theoretical and jurisprudential underpinnings of both contracts, and contract law in general, and South Africa's historical conception thereof. Such an examination is useful, as these underpinnings can provide a useful basis upon which a better and more complete understanding and conception of South Africa's modern contract law can be built. Accordingly, a better critique of the manner in which courts approach the reviewing of exercises of private contractual power can be provided.

[78] See in general Alistair Price and Andrew Hutchison op cit note 3.

i. Individualism – the permeating principle

The political and economic philosophies of the nineteenth century, being those of *laissez-faire* liberalism and, perhaps, more fundamentally, individualism, have permeated and informed the cornerstones of South Africa's law of contract. [79] It would be uncontroversial to state that South Africa's law of contract is, as a general proposition, individualistic in its nature and has as much of its foundation individualism[80], and is predisposed to the doctrines and values which emanate from individualism.[81]

Individualism conceives of persons as atomistic units, only joined to other persons by bonds that are totally contingent, [82] who all have exclusive control of their private domain of autonomy, which private domain is "staked out on the perimeter by the claims of rights". [83] Individualism further accepts, as a given, a world where independent individuals are all encouraged to pursue their own self-interest "rigorously", and a consideration or sensitivity for the interests of others falls outside of the aims of the "way of life" posited by individualism.[84] Save to the extent that individuals are to obey the rules and norms that make it possible to co-exist with other self-interested individuals, individuals are entirely self-reliant, and individuals conduct themselves in a manner which conforms to the belief that all other individuals in the community are motivated entirely by self-interest. [85] Individualism also holds that the law cannot impose upon individuals as a group, the liability of shared profits or loss.[86]

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[79] Dale Hutchison op cite note 1 at 41. C-J Pretorius 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 *THRHR* 638 at 642.
[80] See AJ Barnard-Naude '"Oh what a tangled web we weave…" Hegemony, Freedom of Contract, Good Faith and Transformation – Towards a Politics of Friendship in the Politics of Contract' (2008) 1 *Constitutional Court Review* 155 at 162 at 166 – 167, Alfred Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40 at 45, C-J Pretorius op cit note 79 at 642. This is not to suggest that South African contract law has traditionally never embraced any kind of collectivism (collectivism is discussed later). As Cockrell pointed out in 1992, there were (and still are) instances wherein South Africa's contract law can only be understood in terms a communitarian vision. Those instances, however, were just not privileged. Of course, the extent to which South African contract law may lean towards individualism or collectivism, will be a topic for a lengthy discussion later.
[81] C-J Pretorius 102 'The Basis of Contractual Liability (4): Towards a Composite Theory of Contract' (2006) 69 *THRHR* 97 at 102, particularly at footnote 52.
[82] Alfred Cockrell op cit note 80 at 41.
[83] Alfred Cockrell op cit note 80 at 42.
[84] Barnard-Naude op cit note 80 at 164.
[85] Barnard-Naude op cit note 80 at 164.
[86] Barnard-Naude op cit note 80 at 164.

The ideology of individualism can be seen to comprise of two main, distinct albeit supportive, aspects, namely: market-ideology, and individualist ideology. [87] Accordingly, the ideology of individualism has been referred to as the ideology of "market-individualism". [88] This indicates that the capitalist idea of the market and individualism are "heavily invested in each other." [89]

According to market-ideology, the function of contract law is the facilitation of competitive exchange. [90] Contract law does this by establishing the ground rules by which competitive exchange can be conducted. [91] Save for parties observing matters of procedural fairness, parties must be allowed to contract and bargain with minimal intervention, and their bargains must be adhered to. [92] Furthermore, market ideology promotes certain values and principles, the first being that the security of transactions must be protected. [93] This entails that contract law should both protect a person's reasonable assumption that they have entered into a contract and ensure that a party receives the performance that they bargained for. [94] Secondly, market ideology promotes the principle that the ground rules of contract must be clear, so as to enable the parties bargaining to plan their exchanges with the requisite caution, and thus, certainty is of primary importance. [95] Thirdly, market ideology posits that, bearing in mind contract law's function (being the facilitation of competitive exchange), contract law should accommodate, and its rules should not fall out of line with, commercial practice. [96] Lastly, market ideology holds that many of the rules that concern contract formation are based on convenience, merely because contract law is concerned with avoiding inconvenience in the market.[97] Individualism assumes a world of traders who meet only briefly on the market, where they engage in discrete transactions and exchanges. [98]

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[87] C-J Pretorius op cit note 79 at 639.
[88] C-J Pretorius op cit note 79 at 639.
[89] Barnard-Naude op cit note 80 at 164.
[90] C-J Pretorius op cit note 79 at 639.
[91] C-J Pretorius op cit note 79 at 639.
[92] C-J Pretorius op cit note 79 at 639.
[93] C-J Pretorius op cit note 79 at 639.
[94] C-J Pretorius op cit note 79 at 640.
[95] C-J Pretorius op cit note 79 at 640.
[96] C-J Pretorius op cit note 79 at 640.
[97] C-J Pretorius op cit note 79 at 640.
[98] Alfred Cockrell op cit note 80 at 41.

The second aspect of individualism, individualistic ideology, has as its focus, the voluntary choice of individual persons to enter into the market place, choose their fellow contractors, conclude contracts and bargain on their own terms and honour them. [99] Judicial intervention into contractual relationships should be curtailed so as to ensure that parties have the utmost freedom to strike their bargain, [100] and the role of the state is limited to a "nightwatchman function" whereby the state protects each person's area of individual autonomy from uninvited intrusion.[101] Dominant ideas of individualistic ideology are individual autonomy and self-reliance.[102] Preference is, accordingly, for free will and subjective intention,[103] and other people are viewed with distrust, since there is an "omnipresent danger that one's personal liberty will be restricted when rival spheres of autonomy collide." [104] Value is regarded as something that is to be determined by the subjective preference of an individual's will, and each person has their own idiosyncratic conception of what the "good life" is.[105]Individualism postulates that a person's legal relationships with others are first and foremost defined by free consent, and posits this on the assumption that consent is, itself, a manifestation of individual autonomy. [106] Contract's analytic framework centers on the voluntary assumption of obligations, and the role of contract law is seen to principally be the facilitation of voluntary choices by giving them legal effect.[107] To fulfil its role, therefore, contract law must identify and decline to enforce undertakings that were not truly made voluntarily. [108] Non-voluntary positive obligations are regarded with suspicion as potentially harmful restrictions on personal liberty.[109]

Lastly, a conception of contract which, in its substance is individualistic, ordinarily associates itself with a conception of contract which is in its form, rules based[110] (formalistic). [111] A rules-based form depicts contract law as a set of determinate rules

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[99] C-J Pretorius op cit note 79 at 640.
[100] C-J Pretorius op cit note 79 at 640.
[101] Alfred Cockrell op cit note 80 at 42.
[102] C-J Pretorius op cit note 79 at 640, and Alfred Cockrell op cit note 80 at 41.
[103] C-J Pretorius op cit note 79 at 640.
[104] Alfred Cockrell op cit note 80 at 41.
[105] Alfred Cockrell op cit note 80 at 41.
[106] Alfred Cockrell op cit note 80 at 42.
[107] C-J Pretorius op cit note 79 at 640.
[108] C-J Pretorius op cit note 79 at 640.
[109] Alfred Cockrell op cit note 80 at 42.
[110] Alfred Cockrell op cit note 80 at 44, and C-J Pretorius op cit note 79 at 642.
[111] C-J Pretorius op cit note 79 at 642.

that can be applied in a mechanical way to any situation, and accordingly, there is a limited and diminishing role for judicial discretion, and there is a high degree of certainty. [112]

ii. The individualism inspired principles of consensualism, pacta sunt servanda and freedom of contract

Two cornerstones of the individual philosophy are the doctrines of the freedom of contract and the sanctity of contract [113] which two principles became the foundation of the South African law of contract. [114] The "freedom of contract" allows an individual the freedom to choose whether they wish to contract, with whom and on what terms. [115] The creation of the contract is the result of free choice, or the exercise of an individual autonomy, without any external interference, and during the contracting process individuals and their will are sovereign. [116] Ideally, the law ought not to prescribe formalities for the conclusion of contracts (as agreement should be sufficient to serve as the basis of contract) and, aside from terms that are clearly illegal, the parties ought to be able to choose the terms of their contract. [117] The sanctity of contract (or *pacta sunt servanda*) requires that once the parties have freely struck their bargain, the parties must abide by it. [118] The sanctity of contract has at least two aspects. [119] The first is that if the parties are held to their bargains, they must be treated as the masters of their own destiny, and courts should not indulge in case by case adjustments to the contract on the basis of substantive justice. [120] The second is that, if a contract is strictly enforced by one of the parties, courts should not lightly relieve the other party from its obligation to perform. [121] Thus, contracts and their terms should not be tampered with *ex post facto* but rather be enforced by the court. [122] Put succinctly, "once a court is satisfied that the contract was freely entered into and that

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[112] Alfred Cockrell op cit note 80 at 43.
[113] C-J Pretorius op cit note 79 at 640.
[114] C-J Pretorius 'The Basis of Contractual Liability in South African law (1)' (2004) 67 *THRHR* 179 at 185.
[115] C-J Pretorius op cit note 79 at 640. See too Dale Hutchison op cite note 1 at 41.
[116] See too Dale Hutchison op cite note 1 at 41.
[117] C-J Pretorius op cit note 79 at 640.
[118] C-J Pretorius op cit note 79 at 640.
[119] C-J Pretorius op cit note 79 at 640.
[120] C-J Pretorius op cit note 79 at 640.
[121] C-J Pretorius op cit note 79 at 640.
[122] C-J Pretorius op cit note 79 at 640.

its terms are not immoral, illegal or contrary to the public interest, it should uphold and if necessary enforce the contract…" [123] As put by Jessel MR, in the now oft-cited [124] English case of *Printing and Numerical Registering Co v Sampson*[125]: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice."

The last important consideration that needs to be had is what the basis for the imposition of contractual liability in South Africa is. Despite some early contentions to the contrary,[126] the primary basis for contractual liability in South Africa is true agreement or *consensus ad idem*, in accordance with the will theory. [127] Put slightly differently, primarily, contractual liability will be found in terms of South African law when there is an actual meeting of the minds or subjective agreement. [128] In cases of dissensus, however, contractual liability may nevertheless be founded on the doctrine of quasi-mutual assent, which is based on the reliance theory. [129]

According to the will theory, the basis of contract is to be found in the individuals will, and accordingly, the parties are bound to a contract because they have exercised their autonomous will and have chosen to be bound. [130] In the will theory, principles of individual autonomy are paramount. [131] Proponents of the will theory posit that the will theory gives expression to, and protects, the will of the parties, because individual will is something that is inherently worthy of respect. [132] The will theory is a reflection of

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[123] Dale Hutchison op cite note 1 at 41.
[124] For a comprehensive list of South African cases that have referenced this paragraph see Barnard-Naude op cit note 80 at 168, footnote 75.
[125] 1875 LR 19 Eq 462.
[126] See Dale Hutchison op cite note 1 at 37 – 39. For perhaps one of the most comprehensive detailing of South Africa's basis of imposing contractual liability see C-J Pretorius's collection of articles published in *THRHR* being C-J Pretorius op cit note 114 (for part 1), C-J Pretorius 'The Basis of Contractual Liability in South African law (2)' (2004) 67 *THRHR* 383 (for part 2), and C-J Pretorius 'The Basis of Contractual Liability in South African law (3)' (2004) 67 *THRHR* 549 (for part 3).
[127] *Kgopana v Matlala* (2019) JOL 46370 (SCA) ("***Kgopana***") at para 10.
[128] C-J Pretorius 'The Basis of Contractual Liability in South African law (2)' (2004) 67 *THRHR* 383 at 383.
[129] *Kgopana supra* note 127 at para 10. In terms of the reliance theory, the basis of contract is found in the detrimental reliance by a person on the appearance of agreement. In simple terms this means contractual liability is founded on the reasonable belief of agreement, induced by the conduct of one of the parties. See Dale Hutchison op cite note 1 at 36.
[130] Dale Hutchison op cite note 1 at 35.
[131] C-J Pretorius op cit note 81 at 97.
[132] Morris R. Cohen 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553 at 575.

individualism, and fundamentally, the idea of individual autonomy. [133] The will theory posits, in its individualist conception, that contracts are regarded as voluntarily assumed obligations, to which the parties thereto have subjectively consented, and, that the principle function of contract law is to provide legal sanction to freely assumed agreements. [134] As argued by C-J Pretorius, by adopting consensus as the basis for contractual liability, the South African courts have manifestly affirmed a commitment to the value of individualism. [135]

iii. Critiques

The rise of individualism in the nineteenth century, and its entailing precepts of freedom and sanctity of contract, the will theory and the notion that contractual relations ought not to be interfered with on the basis of a substantive standard of justice, are by no means without critique, albeit they appear to be taken as axiomatic. [136] As poignantly put by Cockrell back in 1992, the privileging of individualism and its entailing prescripts in South Africa's contract law, invariably proceeds on the basis that the preference for individualism (and what it entails), is taken as an axiomatic truth, rather than a controversial premise in an ongoing argument. [137]

The "counter-ideology" to individualism is that of collectivism. [138] In collectivism, there is an emphasis on collective goods, which goods concern matters of value that are common, and are not individualised as either "mine" or "yours". [139] Collective goods are dependent on membership of a community. [140] Collectivism is informed by a communitarian view of society, in terms of which there are no free-floating autonomous individuals, but rather encumbered persons who are implicated members of the community. [141] Communal values are preferred over personal autonomy.

[133] C-J Pretorius op cit note 81 at 98.
[134] C-J Pretorius op cit note 81 at 98.
[135] C-J Pretorius 'The Basis of Contractual Liability in South African law (3)' (2004) 67 *THRHR* 549 at 565.
[136] Alfred Cockrell op cit note 80 at 46.
[137] Alfred Cockrell op cit note 80 at 46.
[138] C-J Pretorius op cit note 79 at 641.
[139] Alfred Cockrell op cit note 80 at 42.
[140] Alfred Cockrell op cit note 80 at 42.
[141] Alfred Cockrell op cit note 80 at 42.

[142]Collectivism proffers that people are social beings, with benefits and burdens that come from living in a collective society, and stresses the value of connection [143] Collectivism emphasises values of reciprocity, solidarity and co-operation, and is committed to altruism, in terms of which other people's interests make a legitimate claim on people, and thus one's positive obligations are not limited to those taken up only by free consent.[144] Even in the absence of choice, because all individuals are joined by communal ties, and not separated by the determinant of consent, individuals may be subjected to open-ended obligations, which flow from individuals' identity and relatedness to others. [145] Collectivism, and its close associate, "consumer-welfarism"[146], suggest that in order to provide a reasonable result the judiciary (and the legislature) are to provide a set of rules which police people's bargains. [147] There is accordingly less place for free individual choice and market principles. [148] Parties who enter into imprudent agreements, may be relieved from liability when justice so requires, and paternalistic intervention will be at its strongest when one of the parties to the contract is weak or naïve.[149]

Consumer welfarism can permeate the law in at least two ways.[150] Firstly, it can promote and deliver specific doctrines, such as estoppel and unconscionability. [151] Secondly, it can also attempt, in general, to promote the role that reasonableness and fairness play in already existing categories of positive law. [152] While consumer-welfarism encourages judicial activism in ensuring that the outcomes of contractual disputes is fair, it hinders consistency, predictability and certainty. [153]

Finally, a conception of contract which is in its substance collective, ordinarily associates itself with a conception of contract law which is in its form, standards based

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[142] C-J Pretorius op cit note 79 at 641.
[143] Alfred Cockrell op cit note 80 at 42.
[144] Alfred Cockrell op cit note 80 at 42.
[145] Alfred Cockrell op cit note 80 at 42.
[146] C-J Pretorius op cit note 79 at 641.
[147] C-J Pretorius op cit note 79 at 641.
[148] C-J Pretorius op cit note 79 at 641.
[149] C-J Pretorius op cit note 79 at 641.
[150] C-J Pretorius op cit note 79 at 641.
[151] C-J Pretorius op cit note 79 at 641.
[152] C-J Pretorius op cit note 79 at 641.
[153] C-J Pretorius op cit note 79 at 642.

[154](i.e. results orientated). [155] A conception of contract, which is in its form standards based, entails the starting point for contract law doctrines taking the form of open-ended standards. [156] The standards provide highly abstract normative propositions, with reference to vague criteria, so to allow for purposive adjudication. [157] The permeating idea is that a just legal outcome should be produced, regardless of whether such an outcome introduces uncertainty into the law. [158] Justice is done by expressing the law in broad standards, which can be individuated through a sensitive appreciation of all the relevant facts and considerations on a case-by-case basis. [159] The role of the judiciary, is therefore, to adjudicate each case before it on the basis of what would be best for community. [160]

b. Constitutional precepts of contract law, and the regulation of private contractual power on the grounds of public policy

On 27 April 1994, the interim Constitution came into effect and on 4 February 1997, the Constitution came into effect. It is beyond the ambit of this submission to detail the manner in which both the Interim Constitution and the Constitution affect, and ought to affect South Africa's common law of contract [161] save to merely set out the relevant sections of the Constitution and briefly comment thereon.

As a start, section 2 of the Constitution states that the Constitution is the supreme law of South Africa, and law or conduct which is inconsistent with the Constitution is invalid, and the obligations imposed by the Constitution must be fulfilled. Section 8 (1) of the Constitution states that the Bill of Rights applies to all law, and binds the

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[154] Alfred Cockrell op cit note 80 at 44, and C-J Pretorius op cit note 79 at 642.
[155] C-J Pretorius op cit note 79 at 642.
[156] Alfred Cockrell op cit note 80 at 43.
[157] Alfred Cockrell op cit note 80 at 43.
[158] Alfred Cockrell op cit note 80 at 43.
[159] Alfred Cockrell op cit note 80 at 43.
[160] Alfred Cockrell op cit note 80 at 43.
[161] This is not the focus of this submission, and such a task would be, with respect, unnecessary. There is in fact great debate in this area both in relation to how the Constitution has been held to affect the common law and the normative question of how the Constitution ought to affect the common law. For come views in this regard see A Cockrell 'Private law and the Bill of Rights: A threshold issue of horizontality' in Y Mokgoro and P Tlakula (eds) *Bill of Rights Compendium* (1998), RH Christie 'The Law of Contract and the Bill of Rights in Y Mokgoro and P Tlakula (eds) *Bill of Rights Compendium* (1998) (updated in 2006), at 3H2 – 3H3, Dale Hutchison op cit note 1 at 50 – 53, Alistair Price 'The Influence of Human Rights on Private Common Law' (2012) 129 *SALJ* 330, and more perhaps more broadly D Davis and K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 403.

legislature, the executive and the judiciary and all organs of state. Section 8 (2) states that a provision in the Bill of Rights binds a natural or a juristic person, if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Section 8 (3) states that when applying a provision of the Bill of Rights to a natural or juristic person in terms of section 8 (2), a court, in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, and, may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1) of the Bill of Rights (i.e. the limitation of rights clause). Importantly too, in terms of section 8 (4), a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. Section 39 (2) of the Constitution states that when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Constitutional Court has interpreted section 39 (2) to have the effect of requiring courts to be proactive in shaping private law to serve constitutional values. [162] Section 39 (2) imposes an obligation on courts to be alive to the Constitution's normative framework, and to ensure that the rules of the common law confirm to what the Constitution requires. [163] Of course, the common law of contract is replete with "open-ended" concepts such as good faith, public policy and reasonableness, which open ended standards provide a ready and convenient means of infusing the law of contract with the spirit, purpose and objects of the Constitution.[164] As argued by Price and Hutchison, without doubt, these provisions have laid a constitutional foundation for a thorough reassessment of the common law's regulation of private activity (such as exercises of private contractual power) in light of the Bill of Rights. [165]

Lastly, it is worth mentioning too that section 172 of the Constitution states that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its

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[162] See *Carmichele v Minister of Safety and Security (Centre for Applies Legal Studies Intervening)* 2001 (4) SA 938 (CC), at para 54.
[163] Dale Hutchison op cit note 1 at 51.
[164] Dale Hutchison op cit note 1 at 51.
[165] Alistair Price and Andrew Hutchison op cit note 3.

inconsistency. [166] Therefore, if a court makes a determination that any law or conduct is inconsistent with the Constitution, it must declare it invalid, to the extent of the inconsistency. Once a court makes such a declaration of invalidity, it may make an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity, and, an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. [167]

i. The Constitutional Court's first pronouncement

The Constitutional Court was first given the opportunity to deal squarely with contractual issues in *Barkhuizen v Napier*[168] ("***Barkhuizen***"). *Barkhuizen* dealt with a time limitation clause, in terms of which legal proceedings had to be instituted within 90 days of an insurers repudiation of a claim under the relevant insurance policy, failing which the insurer, it was agreed in terms of the contract, would not be liable. Barkhuizen instituted legal proceedings after some two years. Barkhuizen contended that the time limitation clause was unconstitutional and against public policy because it infringed his right to access the Court, which right was enshrined in section 34 of the Constitution. Writing for the Majority, Ngcobo J, held that the proper approach to constitutional challenges to contractual terms (and their enforcement) is to determine whether the disputed term is contrary to public policy, which represents the legal convictions of the community, and the values that are held most dear by the society. [169] Determining public policy, so held Ngcobo J, was no longer fraught with difficulties as it is now deeply rooted in the Constitution and the values which underlie it[170] and what public policy is and whether a term in a contract is contrary to public policy must be determined by reference to the values that underlie South Africa's constitutional democracy as given expression by the Bill of Rights. A term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and therefore

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[166] Section 172 (1)(a). This section is often overlooked in relation to the manner in a court will intervene in private contractual relations. This is most likely the case because a contractual term is often seen to be neither law nor conduct. See Dale Hutchison op cit note 1 at 52.
[167] Section 172 (1)(b)(i) and (ii).
[168] 2007 (5) SA 323 (CC).
[169] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 28.
[170] *Barkhuizen* supra note 169 at para 28.

unenforceable.[171] Importantly, Ngcobo J appeared to take issue with the High Court's approach to the matter when the matter was before it.[172] The High Court tested the disputed time limitation clause directly against section 34 of the Bill of Rights. This approach, as highlighted by Ngcobo J, raised the question of "horizontality" which question has to do with the direct application of the Bill of Rights to private persons as contemplated in sections 8(2) and 8(3) of the Constitution. [173] Other than the fact that, at that stage at least, the Constitutional Court had not yet considered the issue of the direct application of the Bill of Rights to private parties, the High Court's approach, which was premised on a direct application of the Bill of Rights, faced further difficulties which were: firstly, the disputed provision, if found to limit a right in the Bill of Rights, was not a "law of general application" and therefore could not be subjected to a limitation analysis under section 36 (1) of the Constitution[174], and secondly, the disputed provision was not "law" or "conduct" in terms of section 172(1)(a) of the Constitution.[175] These two difficulties (and the manner in which the High Court overcame them)[176], reasoned Ngcobo J, "cast grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights."[177]

Ngcobo J went on to state that the maxim *pacta sunt servanda* gives effect to the central constitutional values of freedom and dignity, and that self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital party of dignity. In relation to the maxim of *pacta sunt servanda* Ngcobo J also stated that it is a universally recognised principle that was profoundly a moral principle, on which the coherence of society relies. [178] Ngcobo J held that while public policy, which is informed by the Constitution requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily

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[171] *Barkhuizen* supra note 169 at para 29.
[172] *Barkhuizen* supra note 169 at paras 23 – 26.
[173] *Barkhuizen* supra note 169 at para 23.
[174] *Barkhuizen* supra note 169 at para 23.
[175] *Barkhuizen* supra note 169 at para 25. Section 172(1)(a) states that when deciding a constitutional matter within its power, a court must declare any law or conduct that is inconsistent with the Constitution, invalid to the extent of its inconsistency.
[176] The High Court's reasoning in this regard is not relevant for current purposes but can be gleaned from Ngcobo J's judgement in *Barkhuizen* at paras 24 – 27.
[177] *Barkhuizen* supra note 169 at para 26.
[178] *Barkhuizen* supra note 169 at para 87.

undertaken (*pacta sunt servanda*),[179]public policy also imports the notions of fairness, justice and reasonableness, and would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. [180] Ngcobo J then developed a two-stage test to determine unfairness.

The first stage entails an objective[181] enquiry as to whether the provision was so manifestly unreasonable on the face of it that it offended public policy. [182] This enquiry is directed at the objective terms of the contract. [183] In this first stage of the inquiry a court may consider the relative bargaining powers of the contracting parties. [184] If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. [185]

The second stage, which is more subjective, entails, essentially, an assessment of whether, in the specific circumstances of the matter, the enforcement of the clause would be contrary to public policy. This second stage would entail the party seeking to avoid the enforcement of the clause having to demonstrate why it would be unfair and unreasonable in the given circumstances to enforce the clause.[186] This may very well require an assessment of the reasons why the breaching and/or non-compliant party did or purported to do something contrary to the provisions of the contract. [187]

On the facts of *Barkhuizen*, Barkhuizen's appeal was dismissed as he did not detail his reasons for his non-compliance with the time limitation clause, nor did he lead any evidence in relation to any alleged inequality of bargaining power.[188]

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[179] *Barkhuizen* supra note 169 at para 57.
[180] *Barkhuizen* supra note 169 at para 73.
[181] *Barkhuizen* supra note 169 at para 59.
[182] *Barkhuizen* supra note 169 at paras 56, 57 and 59.
[183] *Barkhuizen* supra note 169 at para 59.
[184] *Barkhuizen* supra note 169 at para 59.
[185] *Barkhuizen* supra note 169 at para 59.
[186] *Barkhuizen* supra note 169 at para 69.
[187] *Barkhuizen* supra note 169 at para 84 – 86.
[188] *Barkhuizen* supra note 169 at para 66.

ii. Post *Barkhuizen* discord

Subsequent to the Constitutional Court's judgment is *Barkhuizen*, the Supreme Court of Appeal in *Bredenkamp and Others v Standard Bank of SA Ltd*[189], rejected the appellants' propositions, which relied on *Barkhuizen*, that the benchmark for the constitutional validity of a term of a contract is fairness, and that even if a contract is fair and valid, its enforcement must also be fair in order to survive constitutional scrutiny. [190] The Supreme Court of Appeal, per Harms, JA, held that *Barkhuizen*, had to be read in context as it involved a contractual term that purported to limit an identified constitutional right (being access to the court). [191] Harms JA held that there was nothing in *Barkhuizen* which purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere was implicated. [192] Harms JA cautioned that even when dealing with constitutional values, the principle of legality should not be overlooked, and that making rules of law discretionary or subject to value judgments may be destructive of the rule of law. [193]

In *Botha v Rich*[194] the Constitutional Court made further important remarks in relation to bilateral contracts and introduced a new consideration into the lawful exercise of private contractual powers, being proportionality. From the outset Nkabinde J, writing unanimously for the Constitutional Court framed the question for determination as whether or not the cancellation of the contract was fair and therefor constitutionally compliant. [195] In relation to bilateral contracts Nkabinde J held that, bilateral contracts are almost invariably cooperative ventures wherein two parties reach a deal involving performances by each in order to benefit both.[196] Honouring a bilateral contract, therefore, reasoned Nkabinde J, cannot be a matter of each side pursuing their own self-interest without regard to the other parties' interest.[197] In relation to whether or not

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[189] 2010 (4) SA 468 (SCA).
[190] *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 1.
[191] *Bredenkamp* supra note 190 at para 46 – 47.
[192] *Bredenkamp* supra note 190 at para 50.
[193] *Bredenkamp* supra note 190 at para 539.
[194] 2014 (4) SA 124 (CC).
[195] *Botha v Rich* 2014 (4) SA 124 (CC) at para 24.
[196] *Botha* supra note 195 at para 46.
[197] *Botha* supra note 195 at para 46.

to enforce the party's purported cancellation of the relevant contract, in terms of the cancellation clause, Nkabinde J reasoned that granting the cancellation, on the facts of the matter, would result in the breaching party suffering a disproportionate penalty for the breach, [198] and that the fairness in awarding cancellation is self-evidently linked to the consequences of doing so. [199] Criticisms of this judgement aside[200] the practical effect of the judgment was, as put by Wallis JA (writing extra curially), that there was a decision from the Constitutional Court which appeared to hold that when a breaching party is faced with the legitimate contractual termination thereof by the innocent party, the breaching party may resist cancellation by saying that, notwithstanding the terms of the contract, in their particular circumstances, the cancellation is a disproportionate response to their breach. [201]

In two subsequent High Court matters, Davis J[202] and Van Oosten J[203], both, on the basis of *Botha*, essentially second-guessed and refused to enforce the exercise of an otherwise lawful private contractual power by a party, on the basis that the prejudice and consequences suffered by the other party would be disproportionate, and therefore as such would be unfair. Both Davis J and Van Oosten J's judgments were overturned by the Supreme Court of Appeal. [204] The apparent discord therefore between the SCA and the Constitutional Court was unhelpful and introduced some uncertainty into South Africa's law of contract. This apparent (or perceived) discord, has however, been put to rest by the Constitutional Court, when it eventually handed down judgment in the matter that Davis J had given judgment on in the High Court, which judgment was overturned by the Supreme Court of Appeal.

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[198] *Botha* supra note 195 at para 51.
[199] *Botha* supra note 195 at para 51
[200] The judgment ought to have just turned on an application and interpretation of the Alienation of Land Act 68 of 1981. See Dale Hutchison 'From *bona fides* to Ubuntu: The quest for fairness in the South African law of contract' (2019) *Acta Juridica* 99 at 101 at 117 – 120, and M Wallis 'Commercial Certainty and Constitutionalism: Are they Compatible' (2016) 133 *SALJ* 545 at 554 – 558.
[201] M Wallis op cit note 200 at 557.
[202] *Baedica 213 CC and Others v Trustees for the time being of the Oregon Trust (IT 728/1995) and Others* 2018 (1) SA 549 (WCC).
[203] *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* (Pty) Ltd 2017 (4) SA 243 (GJ). Almost inexplicably however Van Oosten J's judgment makes no mention of *Botha*. Van Oosten J purported to develop the common law and the principle of *pacta sunt servanda* by infusing them with values of ubuntu and fairness.
[204] See *Trustees for the time being of Oregon Trust v Beadica 213 CC and Others* 2019 (4) SA 517 (SCA), and *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA).

iii. The Constitutional Court clarifies: Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others

On 17 June 2020, the Constitutional Court handed down judgment in the matter of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[205] ("***Beadica***"), which is sure to become one of South Africa's most important, if not the most important, judicial pronouncements on South Africa's law of contract. The majority judgment was penned by Theron J, and as recognised by her, "The extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era". [206] Furthermore, Theron J, before getting into the substance of the judgment also recognised that "[t]here is a widely held view that there is a growing divergence in the approaches to this issue adopted by this Court and the Supreme Court of Appeal. This perceived divergence has contributed to a great deal of undesirable uncertainty in our law of contract."[207] In addition to Theron J's majority judgment[208] there was a dissent penned by Froneman J[209] and a further dissent penned by Victor AJ.

The facts of *Beadica* were relatively simple. The Second Respondent ("**Sales Hire**"), a close corporation, is an operator and franchisor of Sale's Hire businesses, which is in the business of renting and selling tools and equipment. The Four Applicants ("**the Applicant CCs**") were all close corporations, whose members were former long-time senior employees of Sale's Hire. The Applicant CCs entered into franchise agreements with Sale's Hire to operate Sale's Hire business for ten years ("**the Franchise Agreements**"). The Applicant CCs operated their businesses from premises leased from the First Respondent ("**the Trust**"), one of the three trustees of the Trust was the sole member of Sale's Hire. The members of the Applicant CC's acquired their businesses in terms of a black economic empowerment initiative which was funded by the Third Respondent, the National Empowerment Fund ("the Fund").

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[205] [2020] ZACC 13.
[206] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 ("***Beadica***") at para 1.
[207] *Beadica* supra note 206 at para 1,
[208] Concurred with by Khampepe ADCJ, Jafta J, Majiedt J, Mathopo J, Mhlantla J and Tshiqi J.
[209] Concurred with by Madlanga J.

In terms of the franchise agreements entered into between Sale's Hire and the Applicant CCs, the Applicant CCs had to operate their franchised businesses from an approved location, which in terms of the franchise agreements were the premises leased to the Applicant CCs by the Trust ("**the Approved Locations**"). Each of the leases entered into between the Applicant CCs and the Trust ("**the Leases**") were for an initial five year period, but provided the Applicant CCs with an option to renew the Leases for a further five-year period ("**the Option**"). The initial five-year period was from 1 August 2011 to 31 July 2016. To exercise the Option, the Applicant CCs had to notify the Trust in writing at least six months prior to the termination of the initial five-year period (i.e. on or before 31 January 2016). Three of the Applicant CCs purported to exercise the Option in March 2016 and the other Applicant CC seemingly never sent through the necessary notice of renewal. In July 2016, the Trust demanded that the Applicant CCs vacate the leases premises. The Franchise Agreements gave Sale's Hire an election to terminate the Franchise Agreements in the event that the Applicant CCs are ejected from the Approved Locations or if the lease agreements in respect of the Approved Locations are terminated. It was common cause that if Sale's Hire terminated the franchise agreements the Applicant CCs businesses would collapse. However, it appeared to be within Sale's Hire's discretion to allow the Applicant CCs to continue operating their businesses at other approved premises. The (only) reason advanced by the Applicant CCs for their failure to exercise the Option in accordance with its terms was that they were not sophisticated business people and were not fully apprised of their rights and obligations regarding the Options. [210] Put slightly differently, the Applicants explained they were unsophisticated and not versed in the niceties of the law. [211] The Applicant CCs brought an urgent application in the High Court seeking an order declaring that the renewal options had been validly exercised and prohibiting the Trust from taking steps to evict them. The Trust brought a counter-application for the Applicant CCs evictions from the Approved Locations.

As alluded to earlier, the High Court found in favour of the Applicant CCs, declared the Leases validly renewed and dismissed the Trust's counter-application. The High Court relied on *Botha* which it understood as introducing a principle of proportionality

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[210] As put by Theron J at *Beadica* supra note 206 at para 93.
[211] As put by Froneman J at *Beadica* supra note 206 at para 196.

into the law of contract, which was that the sanction of cancellation for breach must be proportionate to the consequences of the breach. [212] The High Court found that the termination of the Leases would result in the termination of the Franchise Agreements, the collapse of the Applicant CCs' businesses and the failure of the black economic empowerment initiatives. These consequences, held the High Court, would constitute a disproportionate sanction for the failure by the Applicant CCs to comply with the strict terms of the Option.[213]

The Supreme Court of Appeal stressed the importance of the principle of *pacta sunt servanda* and the need for certainty in contract, and held that the notion ostensibly derived from *Botha,* that a disproportionate sanction for breach of a contract, or for a failure to comply with the terms of a contract, is unenforceable, which was relied on by the High Court was not a part of South Africa's law of contract and its recognition would undermine the principle of legality. [214] While the Supreme Court of Appeal recognised that a Court may decline to enforce contractual terms which are, or the enforcement of which would be, contrary to public policy, it held that such a power should be exercised sparingly and only in the clearest of cases. [215]

The majority began their judgment by determining whether or not leave to appeal should be granted. In make that determination, the majority acknowledged that the apparent divergence between the approaches of the Constitutional Court and the SCA had been recognised as problematic and undesirable, and that the matter before them presented an opportunity for the Constitutional Court to provide much needed clarity on the issues around the judicial control of contracts. [216] Still while considering whether or not leave to appeal ought to be granted the majority recognised that "[t]he questions about the judicial enforcement of contracts that arise in this case are of general public importance, as contractual relations are at the bedrock of economic life."[217] Once determining that it would be in the interests of justice to grant leave to appeal, the majority went on to provide a substantial history of the judicial enforcement

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[212] *Beadica* supra note 206 at para 196.
[213] *Beadica* supra note 206 at para 11.
[214] *Beadica* supra note 206 at para 12.
[215] *Beadica* supra note 206 at para 12.
[216] *Beadica* supra note 206 at para 17 – 18.
[217] *Beadica* supra note 206 at para 19.

of contracts. [218] Save to set out how the majority interpreted *Botha*, it is not necessary for current purposes to detail the majority's tracking of the history of the judicial enforcement of contracts in its entirety. It is necessary to briefly outline how the majority interpreted *Botha* as that judgment has (most likely) been the judgment which has imbued South Africa's law of contract with the most amount of uncertainty, with its apparent introduction of a principle of "disproportionality." The majority held that *Botha* categorically did no revise or revisit the *Barkhuizen* test, and that *Barkhuizen* remains the leading authority in South Africa's law of contract on the role of equity in contract, as a part of public policy considerations. [219] The majority further held that the "assumption" that *Botha* is authority for the general proposition in South Africa's law of contract that a party who breaches its contractual obligations can avoid the termination of a contract by claiming that termination would be disproportionate or unfair in the circumstances, was based on a misreading of the *ratio* in *Botha* and rests on a misconception of what *Botha* was about. [220]*Botha*, reasoned the majority, must be understood within the "relevant statutory scheme in issue": it concerned the question of whether a seller's contractual right to cancel for breach could be enforced within the statutory scheme created by section 27(1) of the Alienation of Land Act 68 of 1981.[221]

Once the majority had clarified what was held in *Botha* and confirmed that the test outlined in *Barkhuizen* was still the means through which contractual provisions and their enforcement could be judicially second-guessed, the majority went on to clarify certain propositions in South Africa's common law of contract. The majority stated that a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh,[222] and it is only where a contractual term or its enforcement is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it. [223] The enforcement

[218] See *Beadica* supra note 206 at paras 20 - 60.
[219] *Beadica* supra note 206 at para 58.
[220] *Beadica* supra note 206 at para 59.
[221] *Beadica* supra note 206 at para 59.
[222] *Beadica* supra note 206 at para 80.
[223] *Beadica* supra note 206 at para 80.

of contractual provisions cannot be dependent on the idiosyncratic inferences of a few judicial minds. [224]

The majority held that *pacta sunt servanda* is not a relic of South Africa's pre-constitutional common law, and it plays a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to constitutional values,[225] gives persons motivation for social coordination and is crucial to economic development, [226] and if it is to be denuded by the courts, South Africa's constitutional project will be imperilled.[227] Nevertheless, the "pre-constitutional" privileging of *pacta sunt servanda* is not appropriate under a constitutional approach to judicial control or enforcement of contracts."[228] In South Africa's constitutional era, held the majority, *pacts sunt servanda* is not the only, nor the most important principle informing judicial control of contracts and there is no basis for "privileging" it over other constitutional rights and values. [229] The majority went on to hold that "[w]here a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether the enforcement of the contractual terms would be contrary to public policy." [230]

In relation to the proposition of "perceptive restraint" (mainly espoused by the SCA) – according to which a court must only use its power to invalidate or not enforce a contract, sparingly, and only in the clearest of cases [231] – the majority held that, albeit the Constitutional Court has already recognised that a Court ought to exercise its power to second-guess a contract's terms or enforcement only in worthy cases, Courts should not shrink from their constitutional duty to infuse public policy with constitutional values. Furthermore, the notion of "perceptive restraint" should not be used "blithely" as a protective shield for contracts that undermine the very goals that the Constitution is designed to achieve. [232] The majority held that the degree of restraint to be

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[224] *Beadica* supra note 206 at para 81.
[225] *Beadica* supra note 206 at para 83.
[226] *Beadica* supra note 206 at para 84.
[227] *Beadica* supra note 206 at para 85.
[228] *Beadica* supra note 206 at para 86.
[229] *Beadica* supra note 206 at para 87.
[230] *Beadica* supra note 206 at para 87.
[231] See *A B and Another v Pridwin Preparatory School and Others* (2019) All SA 1 (SCA) at para 27.
[232] *Beadica* supra note 206 at para 90.

exercised must be balanced against the backdrop of constitutional rights and values.[233]

On the facts, the majority held that "while the explanation provided [i.e. the explanation why there was non-compliance with the Option by the Applicants] is not the only relevant consideration, it is critical in the overall assessment of whether the enforcement would be contrary to public policy in all the particular circumstances of a case." [234] As stated earlier, the only explanation given by the Applicants for why they did not comply with the terms of the Option was that "they were not sophisticated business people and not fully apprised of their rights and obligations regarding their options to renew the leases."[235] This explanation was not considered sufficient by the majority who held that the harsh outcome alone, without an explanation for the failure to comply, cannot constitute a sufficient basis to hold that the enforcement of the terms of Leases would be contrary to public policy. [236] Accordingly, the majority dismissed the Applicant's appeal with costs.

Although the judgment in *Beadica* appears to finally bring clarity around the issues relating to the judicial second-guessing of the enforcement of contractual provisions on public policy grounds, a final matter to be briefly considered is that of *AB and Another v Pridwin Preparatory School and Others*[237] (**"*Pridwin*"**), which judgment was also handed down by the Constitutional Court on 17 June 2020. Essentially, what was in dispute in *Pridwin* was whether or not the First Respondent, an independent school, could terminate the contract entered into between itself and the parents of two of its Learners, due to the parents alleged misconduct, without a pre-termination hearing. The majority, also per Theron J, stated that "[t]he central question to be considered is whether it is constitutionally permissible for an independent school to expel children due to their parents' alleged misconduct, without following a fair procedure and without appropriate justification for its decision."[238] Although the majority in the Supreme

[233] *Beadica* supra note 206 at para 90.
[234] *Beadica* supra note 206 at para 92.
[235] *Beadica* supra note 206 at para 93.
[236] *Beadica* supra note 206 at para 93.
[237] [2020] ZACC 12.
[238] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12 ("***Pridwin***") at para 97.

Court of Appeal[239], and at least the dissent penned by Nicholls AJ in the Constitutional Court[240] consider the matter mainly through the prism of contract, the majority in the Constitutional Court dispenses with the matter on the basis of the direct applicability of sections 28 and 29 of the Bill of Rights to the matter. Accordingly, despite *Pridwin* admittedly appearing on the face of it to be a contractual matter, for current purposes at least, the majority's judgment does not affect the position in *Beadica* outlined above. However, what is apparent from all four of the judgments penned in *Pridwin*, and the dissenting judgment penned by Froneman J in *Beadica*, the Courts, where the context requires, will not hesitate to directly apply, one way or another, provisions of the Bill of Rights to private parties and their interactions. This issue although important, however, is beyond the remit of this contribution.

[239] *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA)
[240] See *Pridwin* at paras 1 – 96.

V. CHAPTER FIVE: COMPARISON OF THE DIFFERENT STANDARDS

a. Rationality versus Public Policy

I will now endeavour to compare the different standards that a Court will on the one hand, hold the exercise of private contractual power to on the basis of public policy, and, on the other hand, the applicable standards for the exercise of public power on the basis of rationality.

i. The "substance" of the two standards compared

As has been highlighted above, a Court will second-guess the exercise of public power against the yardstick of, *inter alia*, rationality. Fundamentally, rationality is a question of means and ends: is the exercise of public power rationality linked to the legitimate government purpose for which the power was exercised[241] or conferred? For an exercise of public power to be rational it does not have to be either fair or reasonable, and neither does it have to be the most correct or best means which the relevant exerciser of public power could have deployed to achieve the legitimate government purpose sought to be achieved. The exercise of public power merely needs to fall within a very broad spectrum of constitutionally permissible rational means of attaining the legitimate government purpose. Although rationality is determined objectively, a Court that is called upon to second-guess an exercise of public power on grounds of rationality may be required to undertake some (although limited) speculation as to whether the exercise of public power will, either symbolically, or as a matter of empirical causality, have the necessary connection/relationship with the determined purpose to be held to be rational. Moreover, the threshold of rationality does not have as a facet any of the substantive and open-ended requirements that are facets of public policy, such as fairness, reasonableness and justness. When determining whether or not any exercise of public power is rational, there need not be

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[241] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 246 (26 June 2020) at para 19.

considerations of fairness, reasonableness and/or justness. Determining rationality is a rules based and mechanical endeavour in its nature: can (objectively) the means chosen achieve the ends sought to be achieved? If yes, then the exercise of public power passes the rationality threshold. The process followed in making such a decision must only be rational, and the decision maker need not hear representations of the persons affected by their decision.

When a person exercises private contractual power, the threshold which that exercise of private contractual power must overcome to be lawful, on public policy grounds, is not so straight forward. However, at a minimum, for the exercise of a private contractual power to be lawful (and not fall foul of public policy, through the prism of the test outlined in *Barkhuizen* as stated in *Beadica*) it cannot be so unfair, unjust or unreasonable so as to be contrary to public policy, and where a number of Constitutional rights are implicated, a careful analysis will need to be undertaken. This, as has been admitted by the Constitutional Court, is a "hard call"[242]. The "careful balancing exercise"[243] that is required when it comes to determining whether a Court ought to interfere with private contractual relations on public policy grounds is a value laden undertaking which will rarely have a predictable, easy and certain outcome. [244] When determining whether or not the enforcement of a contractual provision is against public policy, a Court will be forced to adjudicate based on open-ended standards, as opposed to hard and fast rules. As outlined above, such standards based adjudication is usually associated with a conception of contract which is underpinned by collectivism, [245] and introduces a level of uncertainty, in that a just outcome is sought to be produced on a sensitive appreciation of all the facts and relevant policies on a case by case basis.[246] Indeed, this is what makes this endeavour a "hard call". A Court that is called upon to second-guess an exercise of private contractual power, on public policy grounds, is required to make a determination of the fairness, justness or reasonableness of such exercise, on the specific facts of the matter. In making such

[242] *Beadica* supra note 206 at para 109.
[243] *Beadica* supra note 206 at para 109.
[244] By way of example, in *Beadica*, collectively through the High Court, the SCA and the Constitutional Court, 12 judges ruled that the strict terms of the Option be enforced and 4 ruled that the strict terms of the Option ought not to be enforced. This is not a forgone conclusion
[245] See above Chapter IV, a, iii.
[246] Alfred Cockrell op cit note 80 at 43.

a determination, the Court will be required to, on the facts, make a finding as to whether or not, in the specific circumstances, the enforcement of the contractual provision is unfair, unjust, or unreasonable, and if so, whether the enforcement of the contractual provision is sufficiently unfair, unjust or unreasonable so as to be contrary to public policy. Such a determination is necessarily highly facts dependant and value laden.

The difference between what rationality (in the context of the exercise of public power) and public policy (in the context of the exercise of private power) requires is best illustrated when viewed through the eyes of the power wielder. Such an illustration can be done with regard to the two fictitious scenarios outlined in Chapter 1. In Scenario 1[247] prior to Y determining whether or not to enforce the strict terms of the relevant clause, Y would need to consider whether the strict enforcement of the clause would, in X's particular circumstances, be so unfair, unjust or unreasonable so as to be contrary to public policy. Assuming a number of Constitutional rights and values are implicated (which would, most likely, always be the case), Y, as a private person, would need to undertake the careful balancing act in determining whether or not the strict enforcement of the contractual provision may be contrary to public policy. Y will be called upon to make difficult value judgements, in circumstances where there are, in effect, endless considerations that may need to take into account of X's possible situation and, how, in X's specific situation, Y's enforcement of the clause may in some way be unfair, unreasonable or unjust in relation to X. In Scenario 2,[248] however, the relevant Minister, to be assured of her decision's lawfulness, would only need to ensure that her decision had a relationship or connection with whatever purpose she was seeking to achieve in exercising her power. There would be no requirement for the Minister to determine whether or not the effect of her decision would be fair, reasonable or just, in the particular circumstances of those persons who are to be affected by the Minister's decision.

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[247] Which was, for ease of reference, a contractual provision which provides: "*X shall have the right to extend the Lease period by a further period as set out in clause 10 below, provided X gives Y written notice of its exercising of the option at least 6 months prior to the termination date*."

[248] Which was, for ease of reference, a Minister's decision to promulgate regulations to the effect that: "*The sale, distribution and transportation of any tobacco products and any alcoholic beverage is prohibited during the National State of Disaster which was declared by the President on 1 June 2020*."

I submit, therefore, that the threshold against which a Court will second-guess the exercise of private contractual power, on public policy grounds, is a higher than the threshold of rationality against which a Court will second-guess the exercise of public power. Put slightly differently, Courts are entitled to hold the exercise of private contractual power on public policy grounds, to higher standards than Courts are entitled to hold the exercise of public power to on rationality grounds. This is illustrated by the fact that a rational exercise of public power will be lawful despite it being unfair, unreasonable or unjust, whereas an exercise of private contractual power will be unlawful if it is "rational" (i.e. exercised for the purpose that the power was conferred), but unfair, unreasonable and unjust, and so much so that it offends public policy. Of course, much of the determination as to which threshold requires a higher standard of conduct comes down to the "so much so" phrase of the preceding sentence. However, that "so much so" aspect is the very subjective aspect of the standard set by the public policy threshold making the exercise of private contractual power less certain and thus allowing Courts a broader discretion to intervene in private contractual relations. This too, it is submitted, supports the proposition that Courts are entitled to hold the exercise of a private power (on public policy grounds) to a significantly higher standard that the exercise of a public power (on rationality grounds).

By means of an illustrative example, consider the facts of, and the Constitutional Court's approach in the case of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("***Motau***"). The basic facts of *Motau* were that the Minister took a decision to remove two directors from the board of the Armaments Corporation of South Africa (SOC) Ltd ("**Armscor**"). Armscor's governing statute, the Armaments Corporation of South Africa Ltd Act 51 of 2003 ("**the Armscor Act**"), permitted the Minister to remove members of Armscor's board on good cause. The two board members challenged the Minister's decision to remove them from the Armscor board on *inter alia* the basis that the Minister's decision was irrational.[249] Khampepe J, in dismissing the two directors rationality challenge, held that the Minister's decision was rationally related to the purpose for which the Minister's power to terminate was conferred, namely executive oversight of the Armscor board. [250] Khampepe J further

[249] *Motau* supra note 65 at para 69 – 71.
[250] *Motau* supra note 65 at para 69 – 71.

held that there was a rational link between the Minister's decision to terminate the two board members and the need to address Armscor's failures. [251] Khampepe J reiterated that the Constitutional Court was not tasked to determine whether the Minister could have made a better or different decision. [252] Whatever the effect that the two board members' termination was going to have on them was an irrelevant consideration, as was whether or not the Minister's decision was fair, reasonable and/or just. If such a factual scenario played out in the sphere of private contractual relations, for the exercise of the equivalent private contractual power to be lawful, the effect of it, or the consequence of it, would both be relevant and determinative. The Minister would , by way of example, have to consider what the effect of being removed from the board of Armscor had on the two board members. [253] If the effect or consequence of the exercise of the private contractual power was so unfair, unreasonable or unjust *vis-à-vis* the two removed members, their removal would be unlawful. The exerciser of private contractual power stands to be second-guessed by a Court against a higher threshold than that of the Minister in *Motau*.

ii. Relevant procedural considerations to bear in mind considering the higher standard of public policy

In addition to the above detailed substantive differences, in terms of procedure, it is important to consider that when a Court comes to second-guess or review the exercise of a public power, often times,[254] through Rule 53 ("**Rule 53**") of the Uniform Rules of Court ("**the Rules**"), it will have the benefit of being in a position to consider both the record of the proceedings sought to be reviewed (i.e. the record of the decision constituting all of the material that was before the decision maker relevant to them making the decision) and the reasons furnished by the decision maker for the decision. As stated by Maya DP (as she then was), Rule 53, by facilitating access to the record of the proceedings under review, enables the Courts to perform their inherent review

[251] *Motau* supra note 65 at para 71.
[252] *Motau* supra note 65 at para 70.
[253] Of course, the two board members could have raised any grounds to plead why the effect of their removal was unfair. They could have argued that they support their families, that they would have their reputations ruined, that projects they were overseeing in the public interest would be thwarted if they were removed.
[254] If, in fact, not all the time. See: *Democratic Alliance v President of the Republic of SA; In re Democratic Alliance v President of the Republic of SA and others* [2017] 3 All SA 124 (GP) ("***DA v President***").

function to scrutinise the exercise of public power for compliance with constitutional precepts. [255] As further held by the Constitutional Court, a record delivered pursuant to Rule 53 is an invaluable tool in the review process and helps the Court in the performance of its reviewing function. [256] The delivery of the record, pursuant to Rule 53, ensures both that the Court has the relevant information before it and that there is equality of arms between persons challenging a decision and the decision-maker. [257] This equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting its case under conditions that do not place it at a substantial disadvantage in relation to their opponents. [258] The effect of this, essentially, is that all parties have identical copies of the relevant documents before them on which to draft their affidavits. [259] Additionally, the further procedural mechanisms that are outlined in Rule 53, such as the Applicant's (i.e. the reviewing party's) right to amend its original notice of motion and supplement its founding affidavit upon receipt of the record and the decision maker's reasons, are useful procedural tools open to litigants to utilise which enable the Court to properly perform its reviewing function. As stated by Vally J, Courts have for the last five decades been able to perform their judicial functions because of the provisions of Rule 53. [260] The important consideration to be taken into account is that Rule 53 sets up a nuanced and purpose-conscious procedure and mechanism through which reviews of exercises of public power can be properly and fully prosecuted by the Applicant and adjudicated by the Court.

The only marginally comparable procedural devices in matters wherein the exercise of private contractual power is to be second-guessed are those contained in Rule 35 of the Rules (being the rules relating to discovery). The effect of this is that when a Court is called upon to make the hard call on whether or not the exercise of a private contractual power is contrary to public policy or not, the Court will be called upon to make such a determination without the benefit of any specifically designed mechanism

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[255] *Helen Suzman Foundation v Judicial Service Commissioner* 2017 (1) SA 367 (SCA) at para 13.
[256] *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para 37.
[257] Erasmus Superior Court Practice, RS 11, 2019, D1-710.
[258] Erasmus Superior Court Practice, RS 11, 2019, D1-710.
[259] Erasmus Superior Court Practice, RS 11, 2019, D1-710, and *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).
[260] *DA v President* supra note 254 at para 21.

comparable to Rule 53 and the benefits such a mechanism may import into the adjudicative process.

The consequence of there being no comparable provision to Rule 53, in instances where the exercise of private contractual power is concerned, is borne out in *Beadica*. In *Beadica*, the various Courts had to make the admittedly difficult decision as to whether or not the failure of a black economic empowerment initiative was sufficiently harsh enough a consequence for the Court to interfere in the parties' contractual relationship. In making this determination, the Courts had to assess the reasons advanced by the Applicant CCs for why they failed to comply with the strict terms of the Option. [261] The only reason advanced by the Applicant CCs was that they were not sophisticated business people and were not fully apprised of their rights and obligations regarding the Options.[262] This reason was accepted in the High Court and in two dissenting judgments in the Constitutional Court, while it was rejected by the SCA and the majority judgment penned by Theron J in the Constitutional Court. Differing judgments on the reason advanced aside, what is common between all of the judgments is that they only had the *ipse dixit* of the members of the Applicant CCs to base their conclusions on. This was the case where what had to be determined was whether or not, in the circumstances, the enforcement of the Option would be against public policy. Such a standards-based and value-laden determination, centred on abstract precepts, would, to be properly undertaken, have to entail an assessment of essentially an infinite number of possibly relevant facts, most of which will likely not be before the Court making the determination. [263] The result of this is that the Court makes a decision not on what is factually the case, as it would do when it has before it the benefit of the record received in terms of the provisions of Rule 53, but on what is put before it by the parties. In both *Barkhuizen* and *Beadica* the Constitutional Court did not rule that, in the circumstances, the enforcement of the relevant contractual provision was not against public policy. Rather, the Constitutional Court in both cases ruled that, on what was placed before it by the party alleging that the strict enforcement was contrary to public policy, it could not rule that the enforcement was against public

[261] *Beadica* supra note 206 at para 93.
[262] *Beadica* supra note 206 at para 93.
[263] This indeed was one of the issues in *Barkhuizen* and *Beadica*.

policy. A slight, but important distinction. Accordingly, it may very well have been that on all the facts and objectively assessed, the strict enforcement of the relevant provisions was contrary to public policy. However, the Court was not in a position, because of what was (not) before it, to make such a determination.

A second more practical or procedural consideration relates to what information is before the exerciser of either a public or private power, and with how much certainty they can rely on the eventual enforcement of their exercise of power by the Court. This consideration is also best illustrated with use of the two fictitious scenarios outlined in Chapter 1. In Scenario 1, before Y considers enforcing the strict terms of the option, and holding X to the six month notice period, Y will need to consider whether or not, in X's circumstances, it's (Y's) exercise of its private contractual power would be so unfair, unjust or unreasonable so as to be against public policy, and whether or not, and to what extent, any of X's rights in the Bill of Rights may be implicated. Y would only be able to undertake such a consideration if it was fully abreast of all the potentially relevant facts in relation to X's circumstances, which, it is submitted Y would never (and in fact could never) reasonably be in possession of. Furthermore, even if Y was in possession of all relevant facts to make the determination, that determination, as continuously stressed by the Constitutional Court, is a difficult and value laden determination. Y would, essentially, be required to enforce its contractual powers and then wait and see what X came up with at the stage of litigation. Accordingly, Y will not be able to predict, with great certainty, whether or not a Court may second-guess the exercise of its private contractual power. While it has always been the case that parties to a contract cannot, with complete certainty, predict the manner in which a Court may adjudicate on any position adopted by those parties *vis-à-vis* the contract, the uniqueness of the public policy threshold is that it necessarily entails a value laden and abstract standards based assessment of both of the parties particular circumstances outside the ambit of the terms of the contract. Accordingly, there is there is more unpredictability and uncertainty than there would ordinarily be when a party litigates on most (if not all) other contractual principles.

On the other hand, in Scenario 2, before taking the decision and exercising her public power, to be sure that a Court will not second-guess her, the Minister would merely

need to be assured that on her own reasons, and on the information that is before her, her exercise of power will attain the power's determined purpose either symbolically or intrinsically. Put slightly differently, the Minister will only need to be assured that her decision, and her exercise of public power, is rationally related to the determined legitimate government purpose. The Minister will not need to consider the effect that her decision will have on any specific person, let alone consider whether or not those effects, in that specific person's circumstances, would be so unfair, unjust or unreasonable so as to be contrary to public policy. Moreover, all the information that the Minister would have to possibly consider, to assure herself that her decision will find protection from the Courts, would be before her, and indeed constructed by her.

b. Is the higher standard private power is held to justified?

As has now been demonstrated, the public policy threshold that a Court will second-guess the exercise of a private contractual power against is significantly higher than the rationality threshold that a Court will second-guess the exercise of a public power against. Furthermore, as has also been demonstrated above, it needs to be noted that there are numerous procedural tools that a Court will have at its disposal when reviewing the exercise of a public power, which tools (or similar tools) a Court will not have when reviewing the exercise of a private contractual power. What needs to be considered now is whether or not such differing levels of threshold are justifiable.

i. Entitled vs Willing to intervene

In Chapter I the proposition was put that Courts, traditionally at least, would not really be entitled to second-guess the manner in which Y exercised its private contractual power in Scenario 1, but would only be entitled to second-guess the manner in which the Minister exercised her public power in Scenario 2. I submitted that this proposition rang true. However, bearing in mind what is set out above, this proposition is untrue at least when it comes to the thresholds of rationality and public policy. The more correct and more nuanced proposition is that: Courts are entitled to second-guess the exercise of private contractual power against the threshold hold of public policy on

significantly wider grounds than Courts are entitled to second-guess the exercise of public power against the threshold of rationality.

This broader entitlement, however, does not necessarily mean that a Court may be more willing to intervene in private contractual relations than it is to intervene in the way public power is exercised. Indeed, the rationale and constitutional imperative that exercises of public power stand to be overturned by the Court is set out at length above. For a Court to intervene in either the exercise of public or private power, it must both be entitled and willing to do so. It is this notion of willingness that will be examined further below.

ii. Deference

A Court's willingness (or lack thereof) to interfere in the exercise of a public power versus a Court's willingness to interfere in private contractual relations can be best assessed through the prism of "deference." What follows below is an examination of how "deferent" a Court will be (i.e. willing or unwilling) to intervene in both the exercise of a public and private power.

1. Deference in public law

The notion of "deference" is no stranger to public law. Outlining the differing conceptions, understandings, and entailments of the notion of deference is well beyond the scope of this submission.[264] However, what the notion of deference essentially entails is that Courts are to treat decision makers (i.e. those who are exercising public powers), or the least the decisions that they come to, with the appropriate amount of deference or respect.[265] In 2000 Hoexter set out what she believed to be the sort of deference South Africa ought to strive toward.[266] Hoexter,

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[264] For a contribution which does exactly this, see PJH Maree and G Quinot 'A Decade and a Half of Deference' (2016) *TSAR* 268.
[265] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) ("***Bato Star***") at para 46.
[266] See Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484.

submitted that that type of judicial deference South Africa should strive toward, should be as follows:

> "*we* [South Africa] *should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal*." [267]

Hoexter's passage above has been quoted with approval by the Constitutional Court.[268]In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[269] O'Regan J held that the need for Courts to show deference flows from the fundamental constitutional principle of the separation of powers.[270] O'Regan J went on to state that in showing deference to the decisions of exercisers of public powers, a Court is recognising and respecting the proper role of the executive within the Constitution.[271] Price outlines two concise reasons which explain and justify the Court's duty of respect (i.e. deference) towards an exerciser of public power's judgment. [272] The first is that of democratic principle and the second is that of institutional competence. [273] In relation to democratic principle, decisions of the

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[267] Cora Hoexter op cit note 266 at 501 – 502.
[268] *Bato Star* supra note 265.
[269] 2004 (4) SA 490 (CC).
[270] At para 46. For a consideration of the issues with O'Regan J's finding in this regard see PJH Maree and G Quinot op cit note 264 in general, but specifically from page 452.
[271] *Bato Star* supra note 265 at para 48.
[272] See Alistair Price 'Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt' (2010) 127 *SALJ* 580.
[273] Alistair Price op cit note 272 at 588.

legislative and executive branches of the state deserve respect as they are “clothed with democratic legitimacy”. [274] The legislative branches of the state are directly, and the executive branches of state are indirectly, accountable to the electorate. [275] Furthermore, evaluative and empirical judgments on contested (and indeed value-laden) political questions by democratically accountable decision-makers ought not to be lightly second-guessed by the Courts. [276]

In relation to institutional competence, Courts are ill-suited compared to the other branches of the state to make decisions, as judges lack the experience, expertise and resources to make certain kinds of policy decisions. [277] Indeed, this is the sentiment expressed by Hoexter in her above seminal passage.

Another important facet of deference is its variability or context specific applicability. Depending on the context and the circumstances, a Court ought to subject the exercise of a public power to varying degrees of scrutiny, or to put it differently, will show varying levels of deference to the public power exerciser. [278] Hoexter postulated that the intensity of a Court's scrutiny and its willingness to intervene in a particular case will depend on factors such as: the policy content of the decision, the breadth of the discretion and the degree of expertise of the decision-maker, the impact of the decision, the degree of public participation in the decision-making process and the presence or absence of an opportunity for internal reconsideration. [279] Price demonstrates that legislative decisions deserve a high level of “respect” from the Courts because of South Africa’s representative and participatory law-making process, whereas decisions of the executive deserve less respect, because they are generally made without the same degree of public participation (if any) as legislative decisions and executive members are only indirectly accountable to the electorate.[280] Even in the context of second-guessing exercises of public power against the

[274] Alistair Price op cit note 272 at 588.
[275] Alistair Price op cit note 272 at 588.
[276] Alistair Price op cit note 272 at 588.
[277] Alistair Price op cit note 272 at 588.
[278] Cora Hoexter op cit note 266 at 503.
[279] Cora Hoexter op cit note 266 at 503.
[280] Alistair Price op cit note 272 at 588.

(objective and low) threshold of rationality, that Courts will exercise varying degrees of deference seems now to be clear. [281]

2. "Deference" in private law

Whereas in public law the Court's deference is explained and justified on the basis of democratic principles and institutional competence, in the context of contract law, a Court's deference (or restraint) is explained and justified mainly on the basis of certain individualistic precepts that underpin the law of contract. The Constitutional Court in *Barkhuizen* expressed how allowing parties the freedom of contract and the principle of *pacta sunt servanda* are expressions of self-autonomy and are the very essence of freedom and a vital part of dignity.[282] Furthermore, as held by the majority in *Beadica*, it is a requirement of public policy that contracts that are freely and voluntary entered into must be honoured. [283] Interestingly, in *Beadica*, the Constitutional Court recognised the important roles that the certainty of contract, and the assurance that lawful contracts will be enforced, play in South Africa's economic development, which development fosters a fertile environment for the advancement of constitutional rights.[284]

Albeit the majority in *Baedica* shied away from endorsing the principle of "perceptive restraint" that was elucidated by the SCA, the majority in *Beadica* made explicit that Courts should only use their power to interfere in private contractual relationships in worthy cases.[285] The majority also held that although the pre-constitutional privileging on *pacta sunt servanda* is not appropriate under a constitutional approach to judicial control of enforcement of contacts, the principle is still crucially important to South Africa's constitutional project. [286] Nevertheless, at the same time, the majority made it clear that Courts must not shrink from their constitutional duty to infuse public policy with constitutional values. [287] A careful balancing act will be required, and the restraint

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[281] See Alistair Price op cit note 272.
[282] *Barkhuizen* supra note 169 at para 28.
[283] *Beadica* supra note 206 at para 83.
[284] *Beadica* supra note 206 at para 83.
[285] Beadica supra note 206 at para 89 – 90.
[286] Beadica supra note 206 at para 86 – 87.
[287] Beadica supra note 206 at para 86 – 87.

to be exercised by a Court must be balanced against the backdrop of South Africa's constitutional rights and values. [288] However, it should also be recalled that section 172 of the Constitution which states that when deciding a constitutional matter within its power, a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. [289]

It appears that there are at least two factors which will have an effect on the level of scrutiny to which a Court will subject the exerciser of a private contractual power. The first is the relative bargaining powers of the parties to the contract.[290] Indeed, the presumed equality of bargaining power has always been one of the reasons Courts have traditionally been unwilling to intervene in private contractual relations and a presumed inequality of power positions in between individuals and the state has historically always been one of the main (if not the main) reasons Courts have been willing to interfere in the exercise of public power. [291] The starker the inequality of the parties' bargaining positions, the higher the level of scrutiny to which the Courts will subject the purported bargain and what it entails. The second factor is whether or not a constitutional right is directly implicated. Although a constitutional right does not have to be implicated for a contractual term or its enforcement to be contrary to public policy, [292] if a constitutional right is directly implicated, the Court will subject the contractual term and/or its enforcement to a higher degree of scrutiny.[293]

3. The two notions of deference compared

My previous submission that Courts hold exercisers of private contractual power to higher standards than exercisers of public power is all the more interesting bearing in mind the differing explanations and justifications of deference for public and private law (or more specifically "contract law") outlined above. Courts are more willing to depart from adherence to the principles that underlie contractual deference than they are to depart from adherence to the principles that underlie public law deference. The

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[288] *Beadica* supra note 206 at para 90.
[289] Constitution, section 172(1)(a).
[290] See *Barkhuizen* supra note 169 at paras 59 and 65 – 66.
[291] Alfred Cockrell op cit note 20 at 31.
[292] *Beadica* supra note 206 at para 87 at footnote 200.
[293] See *Bredenkamp* supra note 190 at para 46 – 47 and *Beadica* supra note 206 at para 87.

Courts' departure from the principles that underlie "contract law" deference appears to look very much like the "paternalistic intervention" that is normally a precept of a law of contract that is more collectivist in its conception.[294] This is especially so as the willingness of the Courts to intervene will vary depending on the relative bargaining strengths of the parties and will be at its strongest when one of the parties is in a significantly less powerful position than the other. [295] It is also unsurprising that this pocket of paternalistic intervention in South Africa's law of contract is inextricably linked with a pocket of South Africa's contract law that is, in its form, standards based (result-orientated). [296]

This paternalistic intervention also explains and justifies why Courts do not accept similar reasoning and logic that results in the adoption of the institutional competence reason and justification for public law deference, in the sphere of private contractual relations. One would assume that individuals are best placed to judge what is in their best interests and regulate their own affairs. In fact, one would assume that individuals are better placed to regulate their own affairs than the various branches of the state are to make the decisions and choices that affect the public at large. Accordingly, one would assume that individuals have the "institutional competence" to make their own decisions and indeed, as stated above and as recognised by the Constitutional Court, recognising such acknowledges and respects individuals' dignity. However, the paternalistic intervention described above is justified (and it is submitted unassailably so) on at least two grounds.

The first is that it is constitutionally mandated. The Constitution shapes the common law and the common law derives its force from the Constitution and is subject to its control. [297] Public policy, which contracts are subject to, and which is informed by the Constitution, has been constitutionally imbued with the values of fairness, reasonableness, and justice.[298] Accordingly, if the protection and attainment of those values require a paternalistic intervention by the Courts into contractual relations then

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[294] C-J Pretorius op cit note 79 at 641.
[295] C-J Pretorius op cit note 79 at 641.
[296] Alfred Cockrell op cit note 80 at 44, and C-J Pretorius op cit note 79 at 642.
[297] *Beadica* supra note 206 at para 71.
[298] *Beadica* supra note 206 at para 72.

that intervention is constitutionally mandated and obligatory. Although public policy has as a facet the principle of *pacta sunt servanda*, that principle is no longer axiomatically privileged over the other values that are found in South Africa's public policy. [299] The second is that, in a society as unequal as South Africa (a fact that the Constitutional Court has taken judicial notice of),[300] judicial intervention in aid of those who may be possessed of lesser bargaining power is justified.[301]

It appears, therefore, that what best distinguishes the deference that a Court has to exercises of public power from the deference that a Court has to the exercises of private contractual power, is democratic principle. When a Court approaches the question of whether or not it can intervene and/or second-guess the exercise of private contractual power, it does not do so on the basis that the individual exercising the power is clothed with democratic legitimacy, nor on the basis that the power wielder is democratically accountable to the electorate for the manner in which they wield that power. When approaching the manner in which an individual exercises a contractual power that they have, the Court cannot take refuge in the knowledge that there will be a second, and better suited, mechanism through which the person wielding the power will be held accountable for their actions, as a Court does when considering the exercises of public power. When it comes to the exercise of private contractual power (in the context of South Africa's individualistic conception of contract law), the Court is, for lack of better phrasing, the last line of defence. Whereas when it comes to the exercise of public power, the last line of defence is the better suited and more appropriate electorate, who have the power to hold elected representatives to account in elections.

iii. Legitimate governmental purpose

A further factor to be considered when comparing the thresholds to which Courts hold exercises of public power (on rationality grounds) and exercisers of private contractual power (on public policy grounds) is that for an exercise of public power to be rational,

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[299] *Beadica* supra note 206 at para 87.
[300] *Barkhuizen* supra note 169 at para 59.
[301] *Barkhuizen* supra note 169 at para 59.

the exercise of the public power must be for a legitimate governmental purpose or a legitimate governmental objective.[302] For any exercise of a public power to be rational, it must serve at least one legitimate purpose. [303] There have been no real judicial pronouncements on how to determine whether a purpose is a legitimate one[304] and Courts will be called upon to make evaluative judgments. [305] Of course, although the threshold of lawful conduct set by public policy in the private contractual realm may be higher than that set by rationality in the public law realm, there is no requirement that any exercise of private law, to be lawful, be done for any purpose other than the power wielder's own self-interest. Accordingly, even if a Court can only hold the exercise of a public power to a standard of rationality, implicit and necessary in that finding of rationality, is the finding that the public power has been exercised for a legitimate governmental purpose. This, it is submitted, is an explanation and justification for Courts holding the exercise of public power to a lower standard than the exercise of private contractual power. When determining whether or not to second-guess the manner in which the private power wielder has exercised its private contractual power, it will be borne in mind that the private contractual power is, more likely than not, acting in their own self-interest, whereas a wielder of public power is acting to further the attainment of a legitimate governmental purpose. Simply put, because a wielder of private contractual power can act for solely in the pursuit of their self-interest, the Court can scrutinise their conduct more closely so as to ensure that it is constitutionally compliant.

That a Court will be more deferential towards a wielder of public power, on the basis of the democratic principle, and on the basis that for the exercise of public power to be lawful, it has to be exercised for a legitimate governmental purpose, is in accordance with South Africa's constitutional make-up. As held by Mogoeng J, "[k]nowing that it is not practical for all fifty five million of us to assume governance responsibilities and function effectively in these three arms of the State and its organs, 'we the people' designated messengers or servants to run our constitutional errands

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[302] See Max Du Plessis & Stuart Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 *SALJ* 597.
[303] Alistair Price op cit note 49 at 355.
[304] Alistair Price op cit note 49 at 355.
[305] Alistair Price op cit note 49 at 355.

for the common good of us all."[306] As further recognised by the Constitutional Court, as a young democracy facing immense challenges of transformation, it needs to be ensured that public power wielders can act efficiently and promptly. [307]

iv. Whose interests must be taken into account

A final point to be made in relation to Courts holding the exercise of private contractual power (on public policy grounds) to a higher standard than the exercise of public power (on rationality grounds) is broadly in relation to whose interests need, in law, to be taken into account. This point can be made again with reference to the two scenarios mentioned previously.

In Scenario 1, in accordance with Hohfeld's conceptualisation as described by Cockrell,[308] Y has a legal power vis-à-vis X, as X labours under a legal liability that its legal position is susceptible to change by Y. Put slightly differently, Y can change X's legal position by enforcing the contractual provision, and holding X to the 6 month notice period. That Y's power is a legal power is clear from the fact that Y can change X's legal position by its mere act of enforcing its legal power. The change in X's legal position occasioned by Y, is not dependent on any further natural causation effects: X's legal position changes merely and only because Y exercises its legal power.

Drawing further on the fictitious example, the position is different in relation to those members of the citizenry, who, owing to Y's exercise of its legal power vis-à-vis X, cannot access alcohol and/or tobacco products (this class of person will herein after be referred to as **"the Public**"). Assume for example that X, a large tobacco and/or alcohol distributor who was renting a premise from Y, now cannot operate its business as it is without premises to operate from as it gave its notice to renew the terms of the lease late. Assume too that it is accepted that the Public have a right to be able to purchase tobacco and/or alcohol products. Y's exercise of its private contractual

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[306] *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) at para 3.
[307] *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) at para 41.
[308] See Cockrell op cit note 20.

power affects the legal situation of the Public (by limiting and/or infringing on their right to purchase the products) causally, meaning that it is not merely and only Y's exercise of its private contractual power that, in and of itself, changes the Public's legal situation. For the Public's right to be infringed there would need to be further natural effects. For example, an alternative distributor would not need to step in and/or X would not have to find alternative premises to operate from. It is only if either of those two effects occur, that the Public's legal situation will change. There is a necessary (and perhaps lengthy) chain of causality that needs to be present for Y's exercise of its contractual power to effect X's legal situation. This is, of course, the hallmark of a non-legal power, or a power of influence, while the Minister's power vis-à-vis the public in Scenario 2, is a legal power. This is so since if the Minister prohibits the sale of alcohol and/or tobacco products, without anything further needing to happen, every member of the Public's legal situation will change, and it will be unlawful to purchase such products. There is no further chain of causality necessary for the public to be lawfully precluded from purchasing such products: it is the mere exercise of the Minister's public power which makes such sale unlawful.

There are at least two important consequences of this. The first is that as the power that Y has vis-à-vis the Public is not a legal power, the Public (as a general proposition at least) cannot challenge or seek to second-guess the manner in which Y exercises that power, assuming, of course, that the Public (or a member thereof) would have the requisite locus standi to even bring such a claim.

The second is that when Y considers exercising its private contractual power, it is submitted that Y does not have to concern itself with the effect that the exercise of its private contractual power may have on the public. Indeed, there is nothing in the majority judgments in *Barkhuizen* or *Beadica* that indicates how, or whether at all, when determining whether or not an exercise of private contractual power is against public policy, the interests of persons not privy to the contract are to be taken into account. While ordinarily public policy considerations relate to the public interest, there is no sentiment expressed in *Barkhuizen* or *Beadica* that persons who are not privy to the contract ought to have their interests considered. Moreover, there is no guidance on whether, for those "interests" to warrant consideration, they would have to be more

than mere interests, and possibly a right or a legitimate expectation, founded in common law, elsewhere, or in the Constitution itself. Indeed, in both of those cases, neither of the parties seriously put before the Courts evidence in relation to how the power wielders exercise of their power would affect parties not privity to the contract. Nor, to put it simply, did the Constitutional Court "go there". Both cases were argued and judged on the basis of the effects on the parties privy to the contract. If the Constitutional Court was seriously inclined to take into account the interests of the public at large (who are not privy to contract), it is inconceivable how the majority in *Beadica* could not have not reached a different outcome bearing in mind the common cause fact that the exercise of the Option would lead to the failure of an affirmative action scheme. Clearly, I submit, the authoritative position now, in light of *Beadica*, is that the effects are to be judged relative to those persons privy to the contract. This limitation on whose interests need to be considered, is another basis upon which the higher substantive standard that Courts hold exercises of private contractual power than exercises of public power is justified. When a public power is exercised, its rationality will (or can be) judged against a much broader scope of persons than the exercise of a private contractual power. I submit that it would be unjustifiable if Courts required exercisers of private contractual powers to take into account the effect that their exercise of their otherwise lawful power would have on the public at large and whether those effects are contrary to public policy as outlined above.

v. The tightrope: in what circumstances would the higher standard become unjustified

I have argued that the standard that Courts hold an exerciser of private contractual power to, on public policy grounds, are higher than the standards that a Court holds an exercise of public power to on rationality grounds. I has also given reasons and explanations as to why, in the circumstances, such a position is justifiable. It will now be argued that there are least two means by which this position may become unjustifiable.

Firstly, this position will become unjustifiable if the Courts recognise a “power of influence” as a legal power that is reviewable. If Courts begin holding persons who exercise private contractual powers liable for the causal effects that the exercise of their power has, wielders of private power will be unduly and unjustifiably constrained in the manner in which they can exercise their rights and powers. In this regard, it will be necessary for Courts to bear in mind that the only powers that the Court ought to concern itself with are legal powers, defined as powers that can the change the legal situation of another person non-causally. Courts ought not to, with reference the above mentioned fictitious example, allow the Public to found a cause of action against Y, for the effect that Y’s power of influence has affected them. Doing so would unjustifiably broaden the scope of consideration that a private power wielder has to have and imbue that private power with requirements ordinarily found in public powers.

Secondly, this position will become unjustifiable if Courts lose sight of the fundamental distinction between a private and public power. As Austin put it, the only actual distinction that one can make between private and public law is that when a condition, or a power, is private, the powers vested in the person who may bear it “more peculiarly regard persons determined specifically” and when the condition is public those powers “more peculiarly regard the public considered indeterminately.”[309] It is submitted that it would be the blurring of this line that would result in the currently justifiable higher standard Courts hold exercisers of private contractual power to (relative to exercises of private power) becoming unjustifiable. This is so, as it would require a wielder of private contractual power to consider the interests of the “public considered indeterminately” and ensure that their exercise of their power does not accrue consequences, that may be held to be contrary to public policy, for this indeterminate class of persons not party to the contract. Requiring a wielder of private contractual power to do so, would impute a strictly public law requirement into their position as a wielder of private power.

It should be recognised, however, that it is not axiomatic that Courts ought to maintain a stark distinction between public and private law, and not imbue into private

[309] Austin op cit note 23 at 774.

contractual relations all the various procedural and substantive requirements historically associated with public law. As was detailed above, many of the assumptions that have traditionally underpinned the distinction between private and public law no longer necessarily hold true. Nowadays in private law relationships there will often be a significant inequity of bargaining power between the parties, and the relationships will be fundamentally unequal. Moreover, as was also outlined above, the distinction between private law and public law can be based on the ideological persuasion of a jurisdiction, which of course may change over time. Accordingly, as South Africa pursues its constitutional project, South Africa's jurisprudence may become increasingly collectivist and communal in its outlook. Indeed, many may argue that normatively this is the direction South Africa ought to go, and legally this is the route that South Africa's jurisprudence has begun to follow. A more collectivist and communal underpinning of South Africa's jurisprudence in general may lead South Africa's jurisprudence closer to adopting the position that all law is public law, and regardless of whether a power is private or public, the power wielder must be conscious of the effects and/or influences that their exercise of their power may have on the public considered indeterminately, whose interests trump those of the individual power wielder. While normatively, such an argument may be appealing, in light of the majority judgment in *Beadica* highlighting the legal and socio-economic importance of many of the individualistic precepts that underpin South Africa's contract law at present, it seems doubtful that at least for the time being, Courts will turn their backs on these traditional precepts, and disregard the fundamental difference between what private contractual power is and what a public power is.

Accordingly, I submit that for it to remain justified that Courts hold the exercise of private contractual power (on public policy grounds) to higher standards than Courts hold the exercise of public power (on rationality grounds), the Courts ought not to hold a "power of influence" to be reviewable, and ought not to lose sight of the fundamental differences between a private and a public power. I submit therefore, that Courts are required to walk a tightrope. Courts have to both imbue South Africa's contract law with Constitutional values, while at the same time ensuring that the higher standard that private contractual power wielders are held to, do not become unjustifiable.

One example of where the Court may arguably have made a ruling at the outer limits of the justifications for holding exercises of private power to higher standards than exercises of public power is the matter of *Annex Distribution (Pty) Ltd and Others v Bank of Baroda*[310] ("**Annex Distribution**"). The facts of *Annex Distribution* were rather simple: twenty applicant companies which had links to the Gupta family ("**the Companies**") sought an interim interdict against the Bank of Baroda, precluding the Bank of Baroda from terminating their banker-client relationship with the Companies, pending final determination of the validity or otherwise of the termination notices issued by the Bank of Baroda to the Companies. Albeit the Court's main concern was with whether or not the Companies had made out a case for interim relief, the facts of the matter inextricably concerned contract, and as recognised by the Court, a Court is allowed to scrutinize the exercise of contractual powers on the basis of public policy.[311] After finding that the Companies had established a prima facie right to a reasonable notice period and that despite the Bank of Baroda's contentions to the contrary, there would be no irreparable harm to the Bank of Baroda should the interim relief be granted, the Court went on to reason, when considering the balance of convenience that:

> "*The dispute transcends the parties' commercial interests. It has a direct impact on the more than 7 600 workers, the majority of whom are Black unskilled and semi-skilled workers. They face a real prospect of losing their jobs if the applicants'* [the Companies'] *businesses collapse. That prospect weighs heavily with me, more than the parties' commercial interests*."

Albeit the Court adopted this reasoning when dealing with a very specific requirement of very specific relief (i.e. the requirement of the balance of convenience in the context of an interim interdict), as stated above, the dispute between the parties was contractual in nature. It is submitted that it is not inconceivable that such reasoning will, or may, be transplanted into disputes regarding whether or not the exercise of any contractual power is compliant with public policy and therefore lawful. By means of

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[310] (52590/2017) [2017] ZAGPPHC 639 (9 October 2017).
[311] *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* (52590/2017) [2017] ZAGPPHC 639 (9 October 2017) ("***Annex Distribution***") at para 69.

example, it may have been argued (or it would have been open to the Companies to argue) – at the hearing where the final determination of the validity or otherwise of the termination notices issued by the Bank of Baroda to the Companies was to be determined – that public policy required that reasonable notice constituted sufficient time for alternative arrangements to be made so that there was no prejudicial and/or unfair consequence to the "workers" (as so described by the Court in *Annex Distribution*) as a consequence of the Bank of Baroda exercising its contractual rights to terminate its relationships with the Companies.

Such an argument, if accepted by a Court, would, it is submitted, be an example of the Court incorrectly walking the hypothetical tightrope. This is so, as, in the first instance, it would constitute the Court recognising the Bank of Baroda's "power of influence" vis-à-vis the workers as a legal (or other) power the exercise of which is subject to judicial review. As is clear, the Bank of Baroda had no legal power vis-à-vis the workers, as its exercise of its contractual power did not, in and by itself, change the workers' legal situation. The workers' legal situation would only be changed causally, if further natural effects followed, such as there being no alternative made. In the second instance, it would constitute the Court taking the view that the Bank of Baroda's contractual power was a power that regarded the public indeterminately. This is so, as if the Bank of Baroda had (as a matter of law) to concern itself with the effect that its exercise of its contractual power had on the general public at large, it would have to take into account the effect of the workers, and the indeterminate list of those other persons whom may be effected. In the Court doing so, the Court would unjustifiably, I submit, hold the Bank of Baroda to a higher standard of conduct than expected of public power wielders (on rationality grounds), and, require the Bank of Baroda to essentially "handle" its power as if it is a public power, thus blurring the lines between what is a public and a private power, and what each requires. Doing so, it is submitted, would make the higher standard that a Court holds the exercise of private power to unjustifiable.

Furthermore, and lastly, if a Court were to accept such an argument, the Court would, I submit, lose sight of the fact that the basis of contractual liability in South Africa (again premised on South Africa's individualistic notion of contract law) is, as has been

demonstrated above, primarily consensus and the will theory. The main basis upon which a person founds contractual liability in South Africa is by means of consensus. One can assume that in *Annex Distribution*, there was never any consensus between the Bank of Baroda and the workers (and to the extent necessary the Companies), that the Bank of Baroda's rights in terms of the various contracts entered into between it and the Companies, were subject to the caveat that they could only be exercised if such exercise accrued no unfair (or other) consequence to the workers. Indeed, as an important matter of practicality, it cannot be said that a contracting party, when entering into a contract with another person, reaches consensus with all other persons that may be effected by the manner in which that party exercises its private contractual powers. That liability that the Bank of Baroda would have laboured under (vis-à-vis the workers), or any liability that any contractual party may labour under brought about by the Court's holding that that party's exercise of its private contractual power is subject to it not unfairly or unreasonably or unjustly affecting any other person, cannot be founded on consensus and accordingly cannot be contractual in its nature. The only basis upon which such liability could be founded is public policy, not consensus. This of course, is a stark departure from South Africa's traditional position which is (in the absence of a statute or some other law of general application) to impose liability on a party where they have either agreed to it, or have committed a wrong (in the law of delict). Moreover, and importantly, this is not a case of public policy broadening or varying a liability that a person labours under. It is a case of public policy creating totally new liabilities and founding them on a party, who may have never contemplated having them. A discussion regarding whether or not such a liability is contractual or not is an important one, but is beyond the remit of this submission.

As much of a departure as such a position may be, normatively, at least it is not axiomatic that liability (in the contractual sense) ought only to accrue to a party by means of consensus. A more communitarian or collectivist outlook to contract law may show persuasion towards a position wherein persons accrue liabilities even in the absence of consensus and on the basis that all individuals are joined by communal ties and are not separated by the determinant of consent. While normatively, such an argument may be possible, jurisprudentially, particularly bearing in mind the majority judgement in *Beadica* highlighting the legal and socio-economic importance of many

of the individualistic precepts that underpin South Africa's contract law at present, it seems doubtful that the Courts will have scope to impute liability onto persons owing to their proximity to a contract and their position in the community.

vi. Keeping balanced on the tightrope

It would be remiss to point out that Courts have a tightrope to walk, without providing any submission in relation to how Courts are to walk this tightrope. In this regard, I submit that the Courts can make use of another fundamental principle of South Africa's contract law, namely, privity of contract as their "balancing tool" while walking this tightrope. The idea of privity, or the privity of contract, as a general rule provides that "contracts bind those who are party to them and parties who are not privy to an agreement have no contractual remedy against the contracting parties." [312] Put slightly differently, "only parties to a contract are bound by it and concomitantly are able to enforce it". [313] Privity of contract, in the South African common law rests on the Roman Dutch notion of a contract as a "*vinculum iuris*", which creates rights and duties only for the parties bound thereby. [314] Simply put, the notion of privity of contract entails that if A and B enter into a contract, a third person, say C, cannot claim to have any rights in terms of the contract entered into between A and B. [315] The only means by which C would be able to gain any sort of right in this situation is if A and B concluded what is known as a contract for the benefit of a third party. Sufficient for current purposes, and debate on the issue aside,[316] if A and B contract so as to extend a benefit to C, and C accepts that benefit and performs any corresponding obligation, C will have a right to that benefit. [317] The primary basis of C's right to the benefit however, is still consensus between the parties. The principle of privity of contract would provide a Court with a means through which to argue, with reference to *Annex Distribution* by means of an example, that unless the contract between the Bank of Baroda and the

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[312] J. R. Midgley 'To What Extent Should Third Parties Have Contractual Rights? A South African Perspective' (1993) 42 (1) *The International and Comparative Law Quarterly* 136, at 137.
[313] Andrew Hutchison and L Siliquini-Cinelli 'Beyond Common Law: Contractual Privity in Australian and South Africa' (2017) 12 (1) *Journal of Comparative Law* 49 at 49.
[314] Andrew Hutchison and L Siliquini-Cinelli op cit note 313 at 63.
[315] J. R Midgley op cit note 312 at 145.
[316] There is debate as to whether, essentially, when C accepts the benefit there are one or two contracts in play. For a recent submission thereon see R Van Zyl 'Die Oorsprong En Ontwikkeling Van Die *Stipulatio Alteri* Tot 'n Suiwer Verklaring in Hedendaagse Suid-Afrikaanse Reg (2)' (2018) 81 *THRHR* 543.
[317] See A Hutchison and L Siliquini-Cinelli op cit note 313 at 64.

Companies included a provision for the benefit of the Workers, which was accepted by the Workers, and the Workers took up any corresponding obligation, the Workers would have no right or entitlement to enforce the contract(s) between the Bank of Baroda and the Company. In upholding the principle of privity of contract, a Court would ensure that an exerciser of private contractual power need not consider the interests an indeterminate class of persons not privy to the relevant contract, to whom a benefit has not expressly been extended and who have not expressly accepted it. Furthermore, so as to avoid holding powers of influence to be reviewable, a Court can reason that the powers the exercise of which are reviewable, are only the powers which parties hold pursuant to their being privy to a contract by means of consensus.

VI. CHAPTER SIX: CONCLUSION

My undertaking in this submission, it is submitted, has been a novel one, and has fundamentally been about the difference and distinction between public and private law. More work is certainly required for the arguments set out herein to be developed and better formulated. Perhaps and for very good reason, matters of private law and matters of public law possibly ought not to be so directly compared. Nevertheless, what I have argued is that, justifiably, the standard that Courts hold the exercise of private contractual powers to on public policy grounds, is higher than the standard that Courts hold the exercise of public power to on rationality grounds, and that, in order to remain balanced on the hypothetical tightrope, Courts can have recourse to the fundamental principle of privity of contract.

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